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## Historical Aspects of State Arbitration Policy

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# HISTORICAL ASPECTS OF STATE ARBITRATION POLICY: GEORGIA, 1732-2004

by

E. R. LANIER

(Under the Direction of Professor Gabriel M. Wilner)

## ABSTRACT

This study examines state arbitration policy in Georgia from its establishment as a colony until the present time. It describes early informal and nonjudicialized procedures such as the Muhlenberg arbitration in Ebenezer in 1774; initiatives of the Georgia Legislature for the arbitral resolution of disputes; the application of arbitral devices in Georgia's tax and municipal corporation law; arbitration in Georgia's chambers of commerce and boards of trade, and forms of public law arbitration still existing in Georgia. The survey then shifts its attention to formal and judicialized arbitration in Georgia, focusing on the rise of uncodified common law arbitration in the nineteenth century and the adoption of formal Arbitration Codes in 1856, 1978; and 1988. The study concludes with reflections on modern challenges to the viability of state arbitration policy in Georgia, especially the risk of total federal preemption of Georgia arbitration policy initiatives.

Index Words: Alternative dispute resolution, Arbitration, Georgia arbitration code, Georgia legal history, Georgia courts, Federal preemption

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## DEDICATION

The study, research, and effort which culminate in this work were undertaken through the love, encouragement and inspiration of Eva Potts Lanier and Leonard E. Lanier, to whom the result is dedicated.

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## PROLOGUE

Not since the adoption of the Federal Arbitration Act<sup>1</sup> in 1925 has public attention in the United States been so drawn to issues touching on arbitral processes as it is at the dawn of the twenty-first century. Near the end of the millennium, the Federal Congress amid a spirited debate enacted into law the Alternative Dispute Resolution Act of 1998<sup>2</sup> which –while directed towards a variety of methods of dispute resolution alternative to conventional litigation– touched directly upon a high degree of popular interest in the subject of contractually agreed upon, binding arbitration as a means of private dispute resolution. This interest, in turn, had been the product of widely publicized instances where contractually mandated arbitration was perceived as a frustration of legitimate consumer interests, imposed on purchasers of goods and services by manufacturers and sellers eager, it was widely believed, to avoid both the exposure entailed in court litigation as well as the “even playing field” of the public court room.<sup>3</sup>

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<sup>1</sup> Federal Arbitration Act, ch. 392, §1, 62 Stat. 669 (1947), now codified as 9 U.S.C. §§ 1-16 [sometimes hereinafter, Federal Arbitration Act of 1925, Federal Arbitration Act, or “FAA.”]. This statutory code is the single most influential law adopted in the United States governing arbitration, and its relation to state laws generally –and the Georgia Arbitration Code of 1988 in particular– will be addressed in this study’s Chapter Three, A Concluding Note: Challenges to Arbitration Policy in Georgia at the Dawn of A New Millennium, Section 1. (The Doctrine of Federal Preemption and the Autonomy of Georgia Arbitration Policy), *infra*.

<sup>2</sup> Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993, amending 28 U.S.C. §§ 651-58. *See generally* C. H. Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768 (2001).

<sup>3</sup> *See generally* Frances E. Zollers, *Alternative Dispute Resolution and Product Liability Reform*, 26 AM. BUS. L. J. 479 (1988). *See also* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts Or A Trap For The Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112 (1993).

As early as 1985, the Supreme Court of the United States had already entertained, but rebuffed, a consumer challenge to the enforcement of an arbitration clause in a franchise contract insisting that arbitration was selected by the franchisor as a means of exploiting the grossly unequal bargaining power of the two parties.<sup>4</sup> A more explicit challenge to arbitration grounded on its supposed frustration of consumer interests was turned back in a more recent decision of the federal Supreme Court which once again found against the consumer's argument insisting that the arbitration contract in that case was unenforceable because it failed to advise the consumer of the substantial costs of arbitration.<sup>5</sup> State courts too, including those of Georgia, have been pummeled with consumer claims that they have been deprived of rights by the arbitral process, one held captive –it is argued– by the interests of the financially stronger, dominant

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<sup>4</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The principal holding in *Mitsubishi* addressed the arbitrability of antitrust claims in an international commercial context, the Court finding that such matters could be resolved by arbitration under the Federal Arbitration Act and were not restricted to adjudication in formal courts. *Soler Chrysler-Plymouth, Inc.*, a local automobile retailer in Puerto Rico, also challenged the enforcement of the arbitration clause by a procedure conducted outside of that Commonwealth on the basis that such would violate Puerto Rico's Dealers Contracts Act, P. R. Laws Ann. Tit. 10, Sec. 278 (1964), *et seq.* ("Act 75"), designed to protect local franchisees against such purported impositions by franchisors. The suggestion of Soler that leaving the resolution of a commercial dispute between commercial parties to other commercial persons somehow undermined the integrity of the process was declined by the Court.

<sup>5</sup> See *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), in which the Court stated, at 89-90 (citations omitted), that:

We have likewise [in previous cases, including *Mitsubishi*] rejected generalized attacks on arbitration that rest on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." ... These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because " 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' " the statute serves its functions.

party.<sup>6</sup> A recent amendment to the 1988 Georgia Arbitration Code, altering the defenses to the enforcement of awards under that law to include any “manifest disregard of the law” by the arbitrators in fashioning the award, was also touted as a measure designed to protect consumer interests.<sup>7</sup>

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<sup>6</sup> In *Results Oriented, Inc. v. Crawford*, 245 Ga. App. 432 (2000), where the consumer (a purchaser of a mobile home manufactured in Alabama under a contract controlled by Alabama law) argued that he did not know he was signing an arbitration clause in a sales transaction and that he did not understand the implications of such a clause, the Georgia Court of Appeals—in language relying on Alabama law but reminiscent of that used by the Supreme Court of the United States in *Mitsubishi* and in *Green Tree, supra*—found the buyer’s attack on the arbitration agreement without merit:

As we have held, the mere existence of an arbitration clause does not amount to unconscionability. Further, lack of sophistication or economic disadvantage of one attacking arbitration will not amount to unconscionability. See *Green Tree Financial Corp. &c. v. Vintson*, 753 So.2d 497 (Ala.1999); [*Green Tree Financial Corporation v.*] *Wampler*, *supra* [749 So.2d 409, at 413 (Ala. 1999)]; *Ex parte Smith*, 736 So.2d 604, 612-613 (Ala.1999); *Ex parte Parker*, 730 So.2d 168 (Ala.1999); see also *Pridgen v. Green Tree Financial Servicing Corp.*, 88 F.Supp.2d 655, 658-659 (S.D.Miss.2000); *Rhode v. E & T Investments*, 6 F.Supp.2d 1322, 1328 (M.D.Ala.1998).

Therefore, [the consumer] has failed to show such coercion, either procedural or substantive, that would be a defense to [the seller’s] motion to compel arbitration of the merits of the dispute ...

*Results Oriented, Inc. v. Crawford*, 245 Ga. App. 432 (2000), at 441.

Consumer contracts continue to present the appellate courts of Georgia with issues respecting a variety of aspects of arbitration. *See, e.g.* *Stewart v. Favors*, 264 Ga. App. 156 (2003), determining that, respecting the binding nature of an arbitration agreement in consumer loan transaction governed by the Federal Arbitration Act, it was incumbent on the court (and not the arbitrator) to determine the enforceability of the agreement.

<sup>7</sup> *See* O.C.G.A § 9-9-13 (b) (5), as amended on April 25, 2003, by HB 792 (2003 Ga. Laws, Act 363, § 2), signed by Governor Sonny Perdue on June 4, 2003, and effective as law on July 1, 2003, discussed in more detail, *infra*, in this survey’s Chapter Two, Section 6, “The 2003 Amendment to the 1988 Georgia Arbitration Code: Manifest

Such assaults on arbitration and the arbitral process in both state and federal courts as well as in the legislatures of the nation have generated a wave of practice and scholarly comment on the compatibility of arbitration with the full expression of consumer interests and on the more fundamental issue of the appropriateness of arbitration as a means of resolving civil claims without regard to the relative economic strength of the parties or the nature of the substantive rights asserted.<sup>8</sup>

Vastly more publicity-generating and debate-provoking than the academic debate over arbitration, however, has been the book and later film, *Erin Brockovich*,<sup>9</sup> the story of a street-wise and struggling divorced mother working as a paralegal in a small law firm in California who stumbles upon a mysterious outbreak of cancer in Hinkley, a tiny desert village situated on the edge of a plant of the Pacific Gas & Electric Company.<sup>10</sup> By sheer determination, hard work, and no small measure of good luck, the heroine of the drama links the community's ailments to

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Disregard of Law.”

<sup>8</sup> Representative of this literature is, for instance, Hossam M. Fahmy, *Arbitration Wiping Out Consumer Rights?*, 64 TEX. B. J. 917 (2001); Shelly Smith, Comment, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191 (2001); S. J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RES. 89; and C. R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695. See also, Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002) and Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2002).

<sup>9</sup> Universal Pictures, 2000.

<sup>10</sup> A good review of the story, and an effort to place the tale within the context of accepted legal literary traditions, is Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497 (2000).

the illegal discharge of toxic waste at the PG&E facility. Her detective work uncovers a plot to hide the company's actions, and a major wrongful death and personal injury law suit is filed.

As the case develops, the small-time lawyer for whom Erin works finds it necessary to invite into the case an experienced attorney from the upper echelons [of the legal profession] to help him both financially and legally...

How did civil litigation work? The people of Hinkley expected to get a jury trial, to have people such as themselves deliver PG&E to judgment day. However, the big lawyers suggest that binding arbitration will be quicker and more efficient. It falls to the small-time lawyer to call the six hundred plaintiffs to a town meeting and sell them on the idea of arbitration. Although popular instincts favor the public face juries give to justice, the lawyer reminds them that PG&E will delay a jury trial for years and "many of you cannot afford to wait." That is the last time anyone mentions a jury trial.<sup>11</sup>

Millions of movie-goers all across the United States –indeed, throughout the world– left theaters after seeing *Erin Brockovich*, better informed about arbitration and its role, but puzzled and uneasy about the arbitral process, its nature, and its relation to dispute resolution in the conventional courts. As a consequence, public interest in the subject of modern arbitration has never been so high as it is at this moment; never has the debate over the merits of arbitration, in contrast to the advantages and disadvantages of dispute resolution in the courts, been so sharp as it is at the present time.

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<sup>11</sup> *Ibid*, at 504.

### *Goal and Plan of the Survey*

This survey of arbitration in its principal formal and informal varieties throughout the history of Georgia, from the time when its charter was first issued under the authority of George II in the summer of 1732 until the turn of the twenty-first century, is intended to demonstrate the rich arbitral tapestry which has enriched the life of this state for almost three centuries. Through an understanding of this arbitral past, the survey may serve as a basis for the debate on the appropriate responses to some of the questions now surrounding arbitration and its place in modern Georgia life.

It engages this task by first, in its Introduction, advancing the organizational framework of the study which centers on the dichotomy of formal and informal, judicialized and nonjudicialized arbitration suggested in the writings of Jerold S. Auerbach, Bruce H. Mann, and others. In its Part I, it then reviews the forms of informal and nonjudicialized arbitration known in Georgia's past, some of which functioned under official sanction and some of which did not. With this array of arbitral practice in focus, the survey then shifts in its Part II to a consideration of major instances of formal and judicialized arbitration which have appeared in Georgia legal history, principally the legislative codes of arbitration of 1856 and 1863 and their modern descendant, the Georgia Arbitration Code of 1988 and a significant amendment to that Code in 2003. It is in this latter arena –primarily one of commercial and business dispute resolution– where the modern debate about the utility and role of arbitration is primarily focused. The survey concludes in its Part III with an examination of such a current issue in modern Georgia arbitration law –the extent of federal preemption of Georgia's legal and constitutional capacity to shape and fashion its own arbitral environment in the future as it has throughout the past.

## INTRODUCTION

Since the advent of the alternative dispute resolution (ADR) movement which gained notoriety in the United States in the 1960s,<sup>12</sup> a variety of social sciences have turned increased attention –and their particular disciplinary tools and methodologies– to an examination of the phenomenon of dispute resolution in organized human society.<sup>13</sup> Among the earliest social scientists<sup>14</sup> to address the broader issues in dispute resolution were anthropologists<sup>15</sup> and

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<sup>12</sup> Perhaps the statutory capstone of this movement was achieved when the United States Congress passed the Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993, amending 28 U.S.C. §§ 651-58, authorizing federal district courts –the trial courts of the federal judicial system– to provide a variety of ADR programs for litigants. *See generally* C. H. Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U.L.REV. 1768 (2001). A useful history of the early stages of this movement –including the rise of the Neighborhood Justice Centers while Jimmy Carter was President of the United States and Judge Griffin Bell was attorney general– can be found in RICHARD L. ABEL, *INFORMALISM, DELEGALIZATION, AND THE FUTURE OF THE AMERICAN LEGAL PROFESSION: THE POLITICS OF INFORMAL JUSTICE* (1982).

<sup>13</sup> The Gruter Institute for Law and Behavioral Research has, over the past several decades, extended the parameters of the research in this important field to include nonhuman primate studies. I am grateful to that Institute for the support provided for me to attend its Spring 2001 Conference in Tübingen, Germany, where my understanding of the relationship of law, anthropology and biology was immeasurably broadened. Important works published by the Institute bearing generally on the theme of extrajudicial dispute resolution include *LAW, BIOLOGY & CULTURE: THE EVOLUTION OF LAW* (Margaret Gruter and Paul Bohannon, Eds., 1983) and *MARGARET GRUTER, LAW AND THE MIND: BIOLOGICAL ORIGINS OF HUMAN BEHAVIOR* (1991).

<sup>14</sup> The literature of arbitration is a vast and an old one, but perhaps the modern study of the field, at least in the United States, begins with the publication of Frances Kellor's works, *ARBITRATION IN THE NEW INDUSTRIAL SOCIETY* (1934) and *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* (1948). Kellor, whose earliest work was in political science, was an early arbitration advocate and a Vice-President of the American Arbitration Association.

<sup>15</sup> The juxtaposition of anthropology and law generally (and dispute resolution in particular) has spawned a vast literature. Some of the earliest anthropologists to explicitly

sociologists.<sup>16</sup> These more recently, however, have been joined by historians (including legal historians)<sup>17</sup> intrigued by the challenge of unraveling the often clouded and uncertain history of the nonviolent resolution of conflicts and disputes in human society, especially through methods outside the arena of public institutions where, by and large, the historical record is somewhat more complete.

The advances made in the historical study of dispute resolution, both conventional and alternative, have done much to shed light on the inner dynamics of the process and its dominant characteristics, as well as the external conditions and circumstances which promote or impede its appearance and effectiveness. While these studies have not yet achieved the universality of an accepted unitary and cohesive theory which explains all facets of dispute resolution outside public institutions, nonetheless great progress had been registered as of the turn of the twenty-

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explore the integration of the two fields and who have heavily influenced subsequent thought include Karl N. Llewellyn and E. Adamson Hoebel who collaborated on the ground-breaking *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941); Max Gluckman, who published *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955); and Laura Nader whose *Choices in Legal Procedure: Shia Moslem and Mexican Zapotec*, 67 *AM. ANTHROPOLOGIST* 394 (1965), remains a classic of this genre.

<sup>16</sup> Unquestionably, Donald Black's two seminal volumes –*SOCIOLOGICAL JUSTICE* (1989) and *THE BEHAVIOR OF LAW* (1976)– have literally defined the discipline of the study of sociology and law. A recent anthology edited by M. P. Baumgartner and including, among others, works by the editor (*Law and Social Status in Colonial New Haven, 1639-1665*); by William J Bowers and Glenn L. Pierce (*Arbitrariness and Discrimination Under Post-Furman Capital Statutes*); William O'Barr (*Speech Styles in the Courtroom: Powerful Versus Powerless Speech*); Henry P. Lundsgaarde (*Murder in Space City*); and Mark Cooney (*Evidence as Partisanship*) –and it was Prof. Cooney of the Sociology Department of the College of Arts & Sciences at the University of Georgia who introduced me to this field– will serve to acquaint the student with the discipline. See M. P. BAUMGARTNER, *THE SOCIAL ORGANIZATION OF LAW* (1999).

<sup>17</sup> The efforts of legal historians to come to grips with the place within the history of law of alternative dispute resolution in general, and arbitration in particular, are addressed more fully and in greater detail hereafter.



first century in identifying social environmental characteristics which bear on the phenomenon, even though disagreement still exists among social science disciplines (and indeed within each of the disciplines considered independently) respecting the enumeration of those factors and their relative priority in shaping the forces which support or deflect the impetus to alternative forms of dispute resolution.

Legal historians seem united, however, in the implicit view that alternative dispute resolution mechanisms not only define themselves in part relative to formal dispute resolution agencies, but that they also demonstrate *change over time*,<sup>18</sup> and that there are discernible patterns in these changes which, once identified, can themselves become useful analytical tools in identifying the phenomenon of ADR in differing historical and social circumstances. For the legal historian, then, ADR offers a field of study not fully appreciated even two or three decades ago.

Jerold S. Auerbach, then of the Wellesley History Department, first published his *JUSTICE WITHOUT LAW?: RESOLVING DISPUTES WITHOUT LAWYERS* in 1983, taking as his point of analytical departure the proposition that the rule of formal law as expressed in official state structures such as courts has consistently been rejected throughout much of American history in

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<sup>18</sup> Examples abound, but Edward Brunet's *Replacing Folklore Arbitration With A Contract Model of Arbitration*, 74 TUL. L. REV. 39 (1999) comes close to a paradigm in this respect. See also William H. Howard, *The Evolution of Contractually Mandated Arbitration*, 48 ARB. J. 27 (1993). Works of this nature tend to be heavily teleological and judgment-laden; in addition, there is a pronounced tendency to concentrate on the history of commercial arbitration in many of these works, to the exclusion of the many other forms of arbitration known and practiced in both European and American experience. See, e.g., Note, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240 (1928); and Eben Moglen, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L.J. 135 (1983), concentrating on the experience with commercial arbitration in New York.

favor of “alternative means for ordering human relations and for resolving the inevitable disputes that arose between individuals.”<sup>19</sup> The nature of these alternative means –and Auerbach identifies these as both arbitration and mediation– and their success in resolving conflict outside of formal state mechanisms are, in his view, a corollary of the existence of “a coherent community vision. How to resolve conflict, inversely stated, is how (or whether) to preserve community.”<sup>20</sup> The “community” which Auerbach envisions as the arena for dispute settlement may be defined as an integrated social unit manifested by a variety of factors including “geography, ideology, piety, ethnicity, and commercial pursuit.”<sup>21</sup> Within groups so defined (communities), arbitration and mediation were adapted, Auerbach maintains, to local circumstances in order to “express an ideology of communitarian justice without formal law, an equitable process based on reciprocal access and trust among community members.”<sup>22</sup> Despite the wide variety of factors contributing to the definition of community and their inherent differences, Auerbach’s research led him to comment on the “singleness of vision” which inspired them and which, despite their diversity, “used identical processes because they shared a common commitment to the essence of communal existence: mutual access, responsibility, and trust.”<sup>23</sup>

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<sup>19</sup> JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 4 (1983).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Auerbach's empirical data were drawn largely from the communitarian experience of groups whose primary cohesive element was religion,<sup>24</sup> especially the Puritans in New England, Quakers in the mid-Atlantic region, and members of the Church of Jesus Christ of Latter Day Saints (Mormons) in Utah.<sup>25</sup> For these groups, Auerbach notes, "Christian doctrine encouraged alternatives to law. Legal institutions languished while religion legitimated the social order."<sup>26</sup> Within these groups, lawyers and the apparatus of the courthouse were irrelevant to the grander issues and purposes of life and "superfluous" within groups where "religion remained the source of moral wisdom."<sup>27</sup>

Although widely separated in fundamental ideology, Auerbach finds that secular commercial interests shared much of the inner sense of cohesion which united religions and ethnic groups, and that this inner sense of unity or purpose led "secular, competitive, and materialistic merchants and businessmen"<sup>28</sup> to create for themselves enclaves from which the formal structures of law and the participation of lawyers were banned. The structures and operative principles<sup>29</sup> which they designed to substitute for those of the formal state were

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<sup>24</sup> Kermit Hall would attribute the strength of church-based arbitration in early American history not to the strength of communitarian values, but rather to the relative weakness of the courts. Colonial experience in Georgia, as will be seen below, seems to provide support for this view. As a consequence, "[a]s formal legal institutions grew in authority, the significance of arbitration and church disciplinary procedures waned." See KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 27 (1989).

<sup>25</sup> JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 5 (1983).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Decisions made in commercial arbitration proceedings on the basis of mercantile interests and practices were derided by judges of the formal courts as "rustic justice." See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal*

intended to (and largely in fact did) “contain conflict within their own community boundaries – with courts and lawyers as remote as possible.”<sup>30</sup> For these mercantile subunits of the broader society, “the familiar patterns of commercial custom were (and remain) vastly preferable to the alien procedures, frustrating delays, and high costs of litigation.”<sup>31</sup> “Even in the modern era,” Auerbach finds, “when business interests have used non-legal dispute settlement to escape the strictures of government regulation, they have expressed a tenacious commitment to communitarian values (in their case, a community of profit).”<sup>32</sup> Auerbach thus shares some of the basic assumptions of the model of eighteenth and nineteenth century commercial arbitration developed by Morton J. Horwitz.<sup>33</sup>

Auerbach’s analysis encompassed not only religious and commercial groups but also found application in newly-arrived immigrant ethnic groups as well. The early Dutch in the colony of New Amsterdam, the Jews who congregated in the lower east side of Manhattan, Scandinavians of Swedish and Norwegian birth who came together in the American Mid-West, as well as the Chinese who populated the west coast of the United States: these all developed

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*Arbitration Act*, 77 N.C. L.REV. 931 (1999), where she quotes Associate Justice Joseph Story of the U.S. Supreme Court in *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass 1845), labeling arbitral awards as “*rusticum iudicium*.”

<sup>30</sup> JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 5 (1983).

<sup>31</sup> *Id.*

<sup>32</sup> *Ibid.*, at 5-6.

<sup>33</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 144-145 (1977). Horwitz’ review of the development of commercial arbitration notes its historical origins within the commercial community, as does Auerbach, but stresses that the independence and autonomy of the system of commercial arbitration were soon sold out, generally by mid-nineteenth century, to judicial control of the process as a means of guaranteeing state enforcement of arbitration awards, a feature unavailable in arbitration of a wholly private, nonjudicial nature.

within their individual ethnic moieties the same alternative dispute resolution mechanism which characterized conflict resolution within secular business and religious groupings. These immigrants,

... aliens in a hostile land . . . encountered a society whose legal institutions often were overtly biased against them or, at best, indifferent to their distinctive values. Their indigenous forms of dispute settlement, centuries old in some instances, shielded them from outside scrutiny and enabled them to inculcate and preserve their traditional norms. Ethnic-group dispute settlement often demonstrated a strong preference for community justice over legal due process, which was significantly less benevolent for new immigrants than government officials and legal professionals proclaimed.<sup>34</sup>

The thesis advanced by Auerbach takes into account a persistent tension and conflict between the internal dispute resolution mechanisms of business, ethnic, and religious groups in the United States and the formal structures of the states and of the organized bar. Especially, Auerbach notes, for the immigrants, the adaptation to American law and legal forms was an external symbol of assimilation into the broader American society; “[I]aw was one of the primary instruments of acculturation; its rapid extension to immigrant community was a national imperative.”<sup>35</sup> As a result, for all ethnic immigrant groups, the adoption of American legal forms was in part an appealing prospect “as a vehicle to hasten their absorption into American

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<sup>34</sup> JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 6 (1983).

<sup>35</sup> *Id.*

society.’<sup>36</sup> Nevertheless, that same absorption was the source of anxiety for others who anticipated –perhaps correctly– that their adaptation to American legal forms would result in a cost to them greater than any benefit that they might thereby obtain. It comes as no surprise, then, that the various ethnic groups assimilated in different ways and at different rates to the requirements of American legal structure. Auerbach notes that the Chinese were successful for a long period of time in retaining their own internal dispute resolution mechanisms as a means of retaining their cultural identity while the Jews in New York, among others, “modified theirs to facilitate acculturation.”<sup>37</sup> The different degrees of adaptation were, Auerbach notes, “as intricate as the American ethnic mosaic itself.”<sup>38</sup>

Auerbach is careful to note that communitarian responses to the insistent demands of American formal law were neither monolithic nor uniform through history:

Even in the most thoroughly legalized society there is likely to be a restless movement over time: between the strictures of the formal legal system and the lure of informal alternatives. To be sure, once the older customary order (based on the shared moral vision of a group) deteriorates, the dominant shift is toward explicit legal rules and procedures “to clarify what the disintegration of community has made dark and slippery.” But the benefits of legalism are unevenly (though seldom randomly) distributed through society. Because the cherished social values of some groups cannot be expressed in legal norms, the transition to legality is neither tidy nor complete. It is the unstable equilibrium,

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

particular to time and place, that opens cultural and historical vistas.

Communitarian efforts, like the American experience itself, are complex and diverse. Yet there are fascinating patterns, and coherent themes, which disputes-settlement processes can eliminate. The enduring Edenic vision of a harmonious community may invariably be undercut – but even in the American experience where law reigns supreme the vision is never entirely stifled.<sup>39</sup>

Although never, as Auerbach puts it, *entirely* stifled, since he is quick to note the metamorphosis of alternative dispute resolution mechanisms within secular commercial, religious, and ethnic groups over time: there is, he insists, a direction in the evolution of alternative dispute resolution devices which is defined by social movements towards individualism, towards “assertive contentiousness,” and towards the judicialization and legalization of social processes once informal and simple. The modernization and commercialization which increasingly characterized American society as the nineteenth century wore on were to take their toll and to weaken the alternative conflict resolution mechanisms spawned within earlier commercial, ethnic, and religious groupings. In Auerbach’s view, the end of the Civil War was a watershed for American alternate dispute resolution because “beyond [the Civil War], amid the turbulence of race and labor relations, alternative dispute settlement was reshaped,”<sup>40</sup> and “in the second half of the nineteenth century, the purposes (if not the forms) of alternative dispute settlement were redefined.”<sup>41</sup> Laura Nader adds to this observation the further view that “fears of racial hostility and class warfare encouraged arbitration as a

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<sup>39</sup> *Ibid*, at 7.

<sup>40</sup> *Ibid*, at 57.

<sup>41</sup> *Id.*

remedy for the congestive breakdown of the court system and as an externally imposed deterrent to social conflict. Until the Civil War, alternative dispute settlement had expressed an ideology of community justice. Thereafter, according to Auerbach [and in the view of Laura Nader] it became an external instrument of social control and a way of increasing judicial efficiency.<sup>42</sup>

Other authorities have used exegetical models similar to that of Auerbach and have applied them to different historical and geographic contexts.<sup>43</sup>

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<sup>42</sup> Laura Nader, *The Recurrent Dialectic Between Legality and Its Alternatives: The Limitations of Binary Thinking*, 132 U. PA. L. REV. 621, 626-627 (1984). Her review of Auerbach's historical model subjects Auerbach's communitarian thesis to scathing critique. Suggesting that this paradigm is "is deceptively simple, and could only have been [advanced] by a scholar deeply steeped in the materials on the varieties of religious, ethnic, and class-based communities throughout our history," *ibid* at 634, she finds that Auerbach's research is infected with "an ethnographic acceptance of questionable assumptions," and that it "fall[s] into the grips of binary thinking." *Id.* The whole structure of Auerbach's conclusions are fundamentally binary, she finds, "solving disputes with or without lawyers, individualistic pursuits vs. communal ideals, the Haves vs. the Have-Nots, litigious Americans vs. non-litigious others." *Id.* This exclusively dichotomous approach robs Auerbach's work of a certain sensitivity, Nader suggests, to the rich tapestry of American alternative dispute resolution which would have been corrected by an integration of his approach with the results of sociological and anthropological research. A more fundamental flaw, Nader argues, characterizes Auerbach's work: it is premised at a number of critical junctures on a variety of unexamined assumptions, the accuracy of which are central to the validity of his overall thesis. For example, Auerbach argues that, over time, American society has moved away from its communitarian roots and has exalted to the rank of canon the preservation of individual liberties and rights. Nader flatly counters that this is wrong and that "nothing requires that individualism and competitiveness be coupled with disorder and contentiousness." *Ibid*, at 635. In fact, she notes, both contentious and noncontentious social groupings have been studied by anthropologists who have found that some of these are based on considerations of trust, but that others are founded on relations presumed to be less trustful. Nader challenges as well the central allegation of Auerbach that American society is the most contentious and litigious in the world, pointing out simply that such an assertion, especially one occupying such a central role to the overriding thesis, cannot simply be put forward without evidence and that, in simple terms, Auerbach has failed to meet his burden of proof in this respect. *Ibid*, at 637.

<sup>43</sup> See, e.g., Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984). In an exhaustive and insightful study of alternative dispute resolution in Connecticut prior to the American Revolution,



A study of the evolution and practice of arbitral dispute resolution mechanisms in Georgia offers much which illustrates the works of theoretical authors such as Auerbach, Mann, and Nader. There has been no time in Georgia history when the arbitral resolution of disputes—here defined most broadly as the binding settlement of a dispute between two or more parties by a third party or parties, accomplished outside the judicial structures for dispute resolution maintained by the state—has not been palpably in evidence. From its earliest days, the Georgia experience has exhibited arbitral processes, if not directly under court supervision, still strongly associated with them. These bare facts alone, nevertheless, neither sustain nor refute the validity of theoretical models of arbitration in history developed by scholars such as Mann, Auerbach, and others. Does the historical record of arbitration in Georgia provide the raw data from which one could substantiate a relation between instances of informal arbitration and communitarian values in the state's religious groups in the colonial period? Did communitarian interests extend to the sponsorship of arbitration as a method of dispute resolution in the Georgia commercial context under the aegis of chambers of commerce, boards of trade, or commodity exchanges? Is there evidence of the state's design to harness earlier informal arbitral processes for public rights issues arising from state-wide, county and local operations? In which contexts were such arbitral

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Mann developed a paradigm for the life cycle of arbitral devices which, although it slightly preceded much of the more recent scholarship on the subject, nonetheless anticipated much of what has been written since his work appeared in 1984. Auerbach's thesis advanced in *Justice Without Law?* appeared at about the same time as Mann's piece on colonial arbitration in Connecticut: "Jerold S. Auerbach's suggestive historical treatment of the interplay between nonlegal dispute settlement and community in America appeared after I completed this article" Mann was later to write. "Our conclusions regarding the colonial period seem complementary, particularly since the changes in legal form discussed [by Mann] were not within the scope of Auerbach's analysis." Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 481, fn. 4 (1984).

processes most used in Georgia? Tax matters? Eminent domain proceedings? How vital is judicialized, formal arbitration today? Do such instances of informal or communitarian-oriented arbitration persist in modern Georgia practice?<sup>44</sup>

These are among the questions which are examined in this work, and these look fundamentally to the legal history of Georgia, both colony and state, for answers.

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<sup>44</sup> If so, is this a good thing? Katherine Van Wezel Stone suggests reasons why this may not be the case:

The present regime of rustic justice embodies a vision of society as a collection of legally autonomous and morally disconnected subcommunities. While there is some truth to this description of our associational life, it does not capture the many ideals, values, and sensibilities that bind us together. The varied, overlapping, and shifting associational ties in American society constitute an experience of pluralism that promotes certain moral and political values and permits what Nancy Rosenblum calls a "democracy of everyday life" to flourish. In addition to, or perhaps because of, our robust associational life, we participate in a common culture and thus we all benefit from a public intellectual space in which general norms are debated, determined, and enforced. Thus, we need to question whether the fractionated and privatized world of rustic justice is a world we want to embrace.

Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1035 (1999).

CHAPTER ONE  
INFORMAL AND NONJUDICIALIZED ARBITRATION IN GEORGIA

Section 1. Arbitration As Alternative: A Note On The Courts of Colonial Georgia

Communitarian values of the kind identified by Mann<sup>45</sup> and Auerbach<sup>46</sup> were among the engines which drove colonial Georgia's particular ethnic and religious populations into the practice of arbitration for the resolution of their conflicts and disputes in the early days of the British outpost on the Savannah River; commercial interests in the colony (and eventually, the state) exerted pressure for similar results later in the eighteenth and well into the nineteenth centuries.<sup>47</sup> Candor requires, however, the frank admission that not all of the forces resulting in the arbitration practice of colonial Georgia were of a positive nature: serious reservations regarding the structure and functioning of the regular court system in colonial Georgia, especially during the period of the Trusteeship (1732-1754) but also during the interlude of royal government in Georgia (1754-1776), provided powerful *disincentives* for resort to the public courts by Georgia's early citizenry. No survey of arbitration in colonial Georgia can safely

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<sup>45</sup> Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N. Y.U. L. REV. 443 (1984), discussed *supra* in the Introduction to this survey.

<sup>46</sup> JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* (1984), discussed *supra* in the Introduction to this survey.

<sup>47</sup> Legislative initiatives to promote commercial arbitration through chambers of commerce, boards of trade, and commodity exchanges are discussed at length, *infra*, in this survey's Chapter One, Section 3, "Statutory Forms of Informal and Nonjudicialized Arbitration in Georgia." Private commercial arbitration subject to public law forms and requirements are the focus of the latter half of this study, particularly the impact of the Georgia Arbitration Codes of 1856 and 1988.

overlook these factors in the apparent popularity of arbitration as a dispute resolution device in the colonial Georgia experience.

*Town Court of Savannah: The Trusteeship (1732–1754)*

Throughout much of the history of Trusteeship Georgia, there effectively existed but a single major judicial tribunal for the colony, the Town Court of Savannah.<sup>48</sup> This tribunal had its origins in the charter provisions granted to the Trustees of the new colony on June 9, 1732, which had made provision for the creation of a judiciary for the period of the Trusteeship, after which all judicial authority would then revert to the crown.<sup>49</sup> Even though the court structure of

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<sup>48</sup> The description which follows here of the Town Court of Savannah, and incidentally of the structure of Georgia courts during the period of the Trusteeship (1732-1754) in the province, is an amalgam of information contained in a variety of historical resources. *See generally* CREATING GEORGIA: MINUTES OF THE BRAY ASSOCIATES, 1730-1732, & SUPPLEMENTARY DOCUMENTS ©. M. Baine, ed., 1995); WALTER McELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA (1912); ERWIN C. SURRENCY, THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT (2001); and *see especially* JAMES ROSS MCCAIN, GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST (1917).

<sup>49</sup> The measure of judicial authority granted to the Trustees under the charter of June 1732 had been extensive, perhaps more so than in any other British colony in North America. Some have seen a counterweight to this broad power in the term limitation to which it was subject:

As the charter was finally issued, there were numerous provisions for imperial control. The most remarkable one was that limiting the powers of government bestowed on the founders of Georgia to a period of twenty-one years. The petitioners had sought greater powers of appointing and removing officers and of establishing courts, and the request was granted only on the condition of the time limitation. Formal laws must be approved by the King, but regulations and orders to fit special occasions could be given without approval. The power of making laws was also limited to a period of twenty-one years, and no law could become effective until actually approved.

Georgia under the charter terms was to be the creation of the Trustees acting jointly, it was clear that the bodies which they were empowered to create were to function and act in the name of the monarch and that the justice which they were to dispense was to be royal in its character and not simply an adjunct of the corporate entity administering it.<sup>50</sup> Acting pursuant to the authority

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JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 25-26 (1917).

<sup>50</sup> The charter granted in the summer of 1732 was explicit in providing that colonial judges were to sit in the name of the monarch:

And we do, of our further grace, certain knowledge and mere motion, grant, establish and ordain, for us, our heirs and successors, that the said Corporation and their successors, shall have full power and authority for and during the term of 21-years to commence from the date of these our letters patent, to erect and constitute judicatories and courts of record, or other courts, to be held in the name of us, our heirs and successors, for the hearing and determining of all manner of crimes, offenses, pleas, processes, complaints, actions, matters, causes, and things whatsoever, arising or happening within the said province of Georgia or between persons of Georgia; whether the same be criminal or civil, and whether the said crimes be capital or not capital, and whether the said pleas be real, personal or mixed; and for awarding and making out executions thereupon; to which courts and judicatories, we do hereby, for us, our heirs and successors, give and grant full power and authority, from time to time, to administer oaths for the discovery of truth, in any matter in controversy or depending before them, or the solemn affirmation to any of the persons commonly called Quakers, in such manner as by the laws of our realm of Great Britain the same may be administered.

WALTER McELREATH, *A TREATISE ON THE CONSTITUTION OF GEORGIA* 224-225(1912). Nor was the lawmaking authority of the infant Colony of Georgia and its relationship to royal authority overlooked in the charter:

And we do hereby, for us, our heirs and successors, ordain, will and establish, that for and during the term of twenty-one years to commence from the date of these our letters patent, the said corporation assembled for that purpose, shall and may form and prepare laws, statutes, and ordinances, fit and necessary for and concerning the government of the said colony, and not repugnant to the laws and statutes of England, and the same shall and may present, under their common seal, to us, our heirs and successors, in our or their Privy Counsel [sic], for our or their approbation

granted them in the charter document, the Trustees moved to create a court for the colony at its meeting at Georgia House in London on November 2, 1732. They designated the single tribunal of the colony as the “Town Court,” granting to it essentially all of the judicial authority which they had derived from the royal charter provisions. This broad subject matter jurisdiction encompassed not only civil but criminal matters as well,<sup>51</sup> and it was left to deduction that both of these forms of justice would be administered not only in the same court but by the same procedure. Essentially then, the Town Court amalgamated into a single entity the functions of a variety of existing English courts, both of a criminal and civil nature.<sup>52</sup> There was, moreover, no

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or disallowance; and the said laws, statutes and ordinances, being approved of by us, our heirs and successors, in our or their Privy Counsel [sic], shall from thenceforth be in full force and virtue within our said province of Georgia.

*Ibid*, at 220-221.

<sup>51</sup> *See generally* on the work of the Town Court, ERWIN C. SURRENCY, *THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT* 4-6 (2001). Early on in the process of negotiation between the Bray Associates and the Board of Plantations and Trade regarding the charter provisions of the new colony, the Associates had suggested the broad powers which the court of the colony would exercise:

And in relation to the regulation of the intended settlements We propose to Your Lordships that this Corporation shall have full Power and Authority to Erect Courts of Record or other Courts to be held in the Name of his Majesty for the hearing and Determining of all and all manner of Crimes, Offenses, Pleas, processes, complaints, Actions, Matters and things arising between Persons inhabiting or residing within the said Limits whether the said Crimes be Capital or not with Liberty of Appeal to King and Council [sic] where the matter in Dispute shall be above £ 300.

CREATING GEORGIA: MINUTES OF THE BRAY ASSOCIATES, 1730-1732, & SUPPLEMENTARY DOCUMENTS 41-43 ©. M. Baine, ed., 1995). The charter of June, 1732, reflected substantially these terms originally proposed by the Bray Associates.

<sup>52</sup> The variety of English tribunals existing at the time of Georgia’s foundation is considered more fully, *infra*.

explicit right of appellate review either in terms of the charter granted by the king or in the provisions implementing that charter adopted by the Trustees in November of 1732.

The personnel of the court consisted of the Bailiffs, of whom there were three,<sup>53</sup> who were assisted in their work by petit juries which would be impaneled to hear complaints brought by citizens in civil matters and would, in a fashion similar to the functioning of English courts in criminal matters, hear criminal cases referred to it on true bills by a grand jury. The grand juries as employed in the Town Court were still the amorphous and somewhat diffuse bodies with a mix of governmental authority –executive, judicial, and legislative– which had been known in metropolitan England: grand juries –and these sat with an indeterminate number of members– basically promulgated community standards in broad form as a kind of legislature, while at the same time specifying infractions of community standards by individuals in its guise as a preliminary criminal body.<sup>54</sup> In all of these functions, the grand jury of the Town Court was a flexible and elastic body, organized *ad hoc* by the bailiffs in response to specific legal needs, and wholly subject to manipulation by the bailiffs to achieve their predetermined ends.<sup>55</sup>

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<sup>53</sup> See ERWIN C. SURRENCY, *THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT* 2-3 (2001). This work also contains a helpful Appendix which sets forth the names of each of the First, Second and Third Bailiffs of the colony (as well as those of the various Recorders), the dates of their respective appointments, and a reference to a documentary source for this information. See *Ibid*, “Appendix I,” at 10-11.

<sup>54</sup> On the work and procedure of colonial grand juries generally, see BRADLEY CHAPIN, *CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660*, 33-34 (1983).

<sup>55</sup> This fact was, of course, was hardly a virtue in the administration of justice, and was the subject of formal recriminations by some colonists directed to the Trustees back home. Perhaps the most celebrated such instance was the petition forwarded to the Trustees by the grand jurors who dissented from the indictment of John Wesley on September 1, 1737, and who protested forcefully the intervention of the bailiff into their deliberations on this matter. See CHARLES COLQUIT JONES, JR., *THE HISTORY OF GEORGIA* 292-294 (Boston: 1883).

Except for a brief and ill-fated attempt to raise up a second Town Court for Frederica on St. Simons Island in 1735,<sup>56</sup> the Town Court of Savannah functioned even after a major reform of the system in 1741 as the premier court of the colony throughout the Trusteeship period and until the institution of a royal court system upon the surrender of the Georgia charter back to the King in 1752.<sup>57</sup> Excluding certain minor offenses (and some few civil matters not exceeding a subject matter jurisdictional amount of forty shillings<sup>58</sup>) the Savannah Town Court existed as *the* court of Georgia for the first several decades of the colony's existence. It was a rough and tumble affair: with judges (the Bailiffs) who were wholly untrained in the law excepting only what they had learned on the job and, in some instances, barely literate, and with grand and petit juries constituted of the kind of backwoods frontiersmen whom the colony had attracted from London's lower middle to lower class elements, the procedures before the court –if these could be dignified with the term– were free for all adventures in creative judicial role playing.<sup>59</sup> Compounding these structural problems with the early Town Court and its procedures were *ad hominem* difficulties centering on Thomas Causton, the First Bailiff of the Town Court for a period during the colony's formative stages.

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<sup>56</sup> JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 201-202 (1917).

<sup>57</sup> W. W. ABBOT, *ROYAL GOVERNORS OF GEORGIA, 1754-1775* 6-7(1959). Abbot attributes the general failure of the Trusteeship to the inability of the colonial administration prior to the advent of royal government to achieve its economic goals on the one hand and, on the other, the loss of the utopian vision which had inspired the colony in the first place.

<sup>58</sup> JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 199 (1917).

<sup>59</sup> *Ibid*, at 212-217, *passim*.



*Thomas Causton and The Town Court of Savannah*

Few figures in early Georgia history have been the subject of so much opprobrium as has Thomas Causton who served under Oglethorpe effectively as the deputy leader of the colony in the period of the Trusteeship until he was deposed from this office in the late 1730s by action of the London authorities. A calico maker<sup>60</sup> back in England, he had run afoul of British tax laws and was, in late 1732, eager to start anew. In November of that year, his name appears in the minutes of the meeting of the Georgia Trustees when they were engaged in detailed planning for the new colony, the charter of which had only months before been approved by George II.<sup>61</sup> Causton was among those first Georgians on the ship *Anne* who came across, first to Charleston and Beaufort, and then barged down to Savannah on February 12, 1733. It is certain too that he occupied a position of prominence—in some respects, even a certain qualified preeminence—in the early days of the settlement, not only functioning as a Bailiff of the Town Court,<sup>62</sup> together with two other individuals, but also as storekeeper,<sup>63</sup> a formal appointment which gave him a virtual monopoly over trade activities officially licensed by the colony.<sup>64</sup> Prospering from these

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<sup>60</sup> HAROLD E. DAVIS, *THE FLEDGLING PROVINCE: SOCIAL AND CULTURAL LIFE IN COLONIAL GEORGIA, 1733-1776*, 60 (1976).

<sup>61</sup> JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 163 (1917).

<sup>62</sup> See *JOURNAL OF THE EARL OF EGMONT: ABSTRACT OF THE TRUSTEES [SIC] PROCEEDINGS FOR ESTABLISHING THE COLONY OF GEORGIA* 8 (Robert G. McPherson, Ed., 1962). Cf. CHARLES C. JONES, JR., *THE HISTORY OF GEORGIA* 151 (Boston: 1883); and JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 163 (1917).

<sup>63</sup> CHARLES C. JONES, JR., *THE HISTORY OF GEORGIA* 151 (Boston: 1883).

<sup>64</sup> Jones is blunt: in the absence of Oglethorpe, the leadership of the colony devolved upon Causton. *Ibid*, at 190.

official functions, Causton amassed in short order a relatively substantial estate in the colony which included not only his property within the township of Savannah itself but a “plantation” outside the city which he dubbed “Oxstead,” but which quickly became known then (and remains today) as Causton’s Bluff, lying between Savannah and the Atlantic coast to the east of the city.<sup>65</sup>

Causton was not a man of great formal education, but the record he amassed in Savannah before the end of the 1730s indicates a sharp and calculating mind and a character which was determined to overcome the modest circumstances of his birth and status, not to mention the somewhat clouded circumstances of his departure from England.<sup>66</sup> Enjoying immensely the exercise of the prerogatives of his official colonial status, prerogatives which would never have touched him had he remained in his native England, Causton soon attracted the envy and jealousy of others, and his own overbearing personality no doubt contributed to his growing unpopularity in the colonial settlement.<sup>67</sup>

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<sup>65</sup> In some readings, this is rendered “Ocstead” and, in some, the not nearly so elegant “Hogstead.” WILLIAM HARDEN, *A HISTORY OF SAVANNAH AND SOUTH GEORGIA* 65 (1913). McCain goes so far as to say that the “finest estate in the colony” was that of Thomas Causton at “Ocstead.” See JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 163 (1917).

<sup>66</sup> HAROLD E. DAVIS, *THE FLEDGLING PROVINCE: SOCIAL AND CULTURAL LIFE IN COLONIAL GEORGIA, 1733-1776*, 60 (1976). See also CHARLES C. JONES, JR., *THE HISTORY OF GEORGIA* 266-274 (Boston: 1883), on the fall of Thomas Causton from his position of authority in the colony.

<sup>67</sup> Harden describes some of the reasons for Causton’s growing unpopularity:

Though left in charge of the colony during the absence of the leader, Causton was fully advised beforehand as to the duties he was to perform and what authority he should exercise. Notwithstanding this, he acted in such a way as to cause great displeasure to the people and to be the subject of the special rancor of those men who have become known [in Georgia history] by the title of “malcontents” ... They arraigned him in this

In his defense it must be said that the exercise of his official duties as bailiff (or judge) of the court and as storekeeper (with its attendant function of licensing trade transactions, trade agents, and generally controlling commercial flows in the city) were not calculated to win him any popularity contests; at the same time, his rather imperious method of discharging the duties did little to blunt the natural dislike which the performance of his duties would engender. Nonetheless, it appears that Oglethorpe –the undisputed patriarch of the colony– continued to hold Causton in some degree of regard, retaining him in office even though other colonial bureaucrats were not infrequently dismissed for one shortcoming or the other. Many of Oglethorpe’s duties, especially those of a military nature, required his repeated absences for long periods of time from Savannah; given this circumstance, perhaps the sheer necessity of the

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language: “Whilst we labored under those difficulties in supporting ourselves, our civil liberties received a more terrible shock; for instead of such a free government as we had reason to expect, and of being judged by the laws of our mother country, a dictator (under the title bailiff and store-keeper) was appointed and left by Mr. Oglethorpe, at his departure, which was in April, 1734, whose will and pleasure were the only laws in Georgia. In regard to this magistrate, the others were entirely nominal, and in a manner but ciphers. Sometimes he would ask in public their opinion, in order to have the pleasure of showing his power by contradicting them. He would often threaten juries, and especially when their verdicts did not agree with his inclination or humor, in order the more fully to establish his absolute authority, the store and disposal of the provisions, money, and public places of trust, were committed to him; by which alteration in his state in circumstances he became in a manner infatuated, being before that a person of no substance or character, having come over with Mr. Oglethorpe amongst the first forty, and left England upon account of something committed by him concerning his majesty’s duties. However, he was fit enough for a great many purposes, being a person naturally proud, covetous, cunning and deceitful, and would bring his designs about by all possible ways and means.

situation required that the colonial leader retain all the assistance he could muster, regardless of its quality or deficiencies.<sup>68</sup>

There were numerous complaints that Causton was partial at the store, that he did not give everybody equal treatment, that he was domineering, and that he was generally hard to get along with. The Trustees sent over the complaints which they received to be answered after their usual custom, but there is no indication that they or Oglethorpe were dissatisfied with Causton's actions. Because he came into contact with most of the people as storekeeper, Causton was in a vulnerable position to be complained about. He seemed able to take responsibility and to get things done, abilities not uniformly displayed upon Georgia's early colonists. He undoubtedly had a hot temper and probably favored some colonists

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<sup>68</sup> Although it runs counter to the conventional impression, it seems that during the bulk of the period of Oglethorpe's leadership of the colony, he was either in the south along the disputed Florida border and at Frederica on military missions, at Charleston in Carolina conferring with English officials there, or otherwise back in England engaged in business with the Trustees: his time in the colonial capital at Savannah was rather limited and his reliance on second-level officials such as Causton all the more necessary and explicable. *See* SARAH B. GOBER TEMPLE & KENNETH COLEMAN, *GEORGIA JOURNEYS, BEING AN ACCOUNT OF THE LIVES OF GEORGIA'S ORIGINAL SETTLERS AND MANY OTHER EARLY SETTLERS FROM THE FOUNDING OF THE COLONY IN 1732 UNTIL THE INSTITUTION OF ROYAL GOVERNMENT IN 1754*, 24 (1961), describing the effect on the people of the colony caused by Oglethorpe's absence in Charleston as early as 1733; *see also* JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 147 (1917). The Trustees, McCain there notes:

... had never authorized Oglethorpe to act for them on any extensive scale, but if they had expected it, it would have been impossible. He was out of the province a great deal, and after 1735 his almost constant residence at Frederica made it impossible for him to supervise work at Savannah, where most of the executive officials were located.

over other. That he had ability seems obvious from what both his enemies and his friends said about him.<sup>69</sup>

The grudging acknowledgment of his ability and talent, even by those opposed to him, did not extend far enough to provide him an immunity from the growing discomfort of the Trustees regarding the man who had become, essentially, the second in command and chief judge of the only effective court in the colony of Georgia:

He was not a popular official, and he succeeded in getting the ill will and even active opposition of some of the best men in Savannah. The Trustees complained occasionally of his neglect in writing to them and in sending his accounts promptly; but they trusted him fully until the spring of 1738, when they found that he had gotten them into debt by several thousand pounds. They then suspected him of fraud and ordered his arrest, suspending him from his offices of storekeeper and first bailiff until his accounts were satisfactorily adjusted. The accounts never were completed; they were worked over by a committee for about eight years; and then Causton went to England to try to settle them in person with the Trustees. He was only partially successful and he was returning to Georgia in 1746 to complete the work when he died at sea. It was never proven he acted with fraudulent intent in his dealings with the Trust; but it was undoubtedly true that

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<sup>69</sup> SARAH B. GOBER TEMPLE & KENNETH COLEMAN, *GEORGIA JOURNEYS, BEING AN ACCOUNT OF THE LIVES OF GEORGIA'S ORIGINAL SETTLERS AND MANY OTHER EARLY SETTLERS FROM THE FOUNDING OF THE COLONY IN 1732 UNTIL THE INSTITUTION OF ROYAL GOVERNMENT IN 1754*, 72 (1961).

he reaped a great deal of personal profit out of them and that he almost ruined the Trust by his mismanagement<sup>70</sup>

The historical record, then, makes the judgment almost unavoidable: the person of Thomas Causton may well have been one of the primary and decisive factors in making arbitration a dispute resolution method of choice in early colonial Georgia and, in addition, almost certainly contributed to the popularity of that extrajudicial dispute resolution device in Georgia's very earliest years.<sup>71</sup>

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<sup>70</sup> JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 164 (1917).

<sup>71</sup> The Salzburgers –whose steadfast reliance on arbitral methods of dispute resolution is considered in some detail in the present Chapter of this survey, Section 2, “An Arbitration in Colonial Georgia: The Salzburger Experience in Ebenezer”– certainly were aware of Thomas Causton's activities as bailiff of the Town Court. When, in 1737, John Wesley (a confidant of the Salzburger leadership in the colony and soon to become the founder of Methodism) was haled before the Town Court on a variety of charges stemming from his relation with Sophia Hopkey, the niece of Thomas Causton, the bailiff personally intervened in the matter in almost all its aspects. These ranged from drawing up the allegations against Wesley, hand-picking the grand jury, manipulating the processing of the matter to Wesley's disadvantage and, ultimately, delaying the hearing in the case in order to harass the Anglican minister and successfully drive him from the colony. On Wesley's trial in Causton's court, *see generally* CHARLES COLQUIT JONES, JR., *THE HISTORY OF GEORGIA* 288-296 (Boston: 1883). Wesley's infatuation with the young woman and the legal proceedings which flowed from it are romanticized in WILLIE SNOW ETHRIDGE, *STRANGE FIRES: THE TRUE STORY OF JOHN WESLEY'S LOVE AFFAIR IN GEORGIA* (1971), a work that stays relatively close to historical sources, and in MARIE CONWAY OEMLER, *THE HOLY LOVER* (1927), a romanticized work which has no such ambition.

*The Courts of the Royal Colony of Georgia (1754-1776)*<sup>72</sup>

At the end of 1751, the Trustees made the decision, prompted by a variety of economic and political factors, to cut short the tenure which they held under the 1732 Georgia charter and to surrender the colony to royal control and administration. An interim period of almost two years then ensued until the arrival from London of the colony's first royal governor, John Reynolds, who reached Savannah in October of 1754. Reynolds quickly set about replacing the courts of the Trusteeship with ones established under royal mandate.<sup>73</sup> While the establishment of a system of royal courts in Georgia at that time was undoubtedly a substantial improvement in the administration of justice over the dark days of Thomas Causton's reign in the old Town Court, royal courts too –particularly as political and economic tensions mounted between the American colonists and the British monarchy after the Treaty of Paris in 1763– demonstrated

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<sup>72</sup> I follow here the convention suggested by W. W. Abbot in *ROYAL GOVERNORS OF GEORGIA, 1754-1775* (1959), and count the end of Trusteeship government in the colony of Georgia (and beginning of the royal administration) in 1754. There is little doubt, of course, that the legal life of the colony began on June 9, 1732, when George II granted the charter which brought the Trusteeship into existence; this *de jure* beginning was followed the next year by the physical establishment of the colony when, on February 12, 1733, the first settlers landed at Yamacraw Bluff. The termination of the Trusteeship, however, is not so easily or clearly fixed. The Privy Council decided to end the Trusteeship before its twenty-one year charter period had expired, a decision taken at its meeting of December 19, 1751; accordingly, on June 23, 1752, four Trustees –the only ones in attendance at the meeting– executed a surrender of the charter (essentially, in form, a deed) back to the king, thus ending the legal existence of the Trusteeship. Nonetheless, Trusteeship administration of the colony –there being in truth none other there–limped along for another couple of years until, in late October of 1754, Royal Navy Captain John Reynolds arrived in Savannah with his commission as royal governor to begin the work of colonial administration. See JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 134-135 (1917).

<sup>73</sup> A detailed description of the judicial transition from proprietary to royal colony is found in ERWIN C. SURRENCY, *THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT*, 15-23 (2001).

disincentives to their use and, hence, reasons for the colonists to resort to arbitration outside the formal court structure to resolve their conflicts and disputes. In short, these negative features of the royal courts stemmed from their excessive technicality, particularly in the circumstances of a frontier province such as Georgia,<sup>74</sup> and the lack of a jury in the procedures of several of the royal courts, particularly Chancery and Admiralty. These are examined briefly here.

### *The General Court*

This was the primary court of the colony following the revocation of the 1732 charter and the creation of royal courts for Georgia. It was a court of record held four times annually and gathered into itself the jurisdiction of three separate English tribunals, that of King's Bench<sup>75</sup>;

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<sup>74</sup> Erwin Surrency speaks of common law procedure as "highly technical and hence, needlessly complex," but suggests that colonial dissatisfaction with the system was, at least in part, due to the fault of Americans who attempted to apply common law procedure to disputes not addressed by the system in England and therefore inappropriate for resolution by it and, in addition, the failure of a vast majority of colonists to truly understand the system at all. *Ibid.*, at 190.

<sup>75</sup> So called because the monarch himself frequently sat at its sessions (and hence was referred to as *coram ipso rege*), the Court of King's (or Queen's) Bench was effectively the "supreme court" of the common law, joining in itself extensive power in both criminal ("crown side") authority and civil ("plea side") jurisdiction. A part of the *aula regis*, it traveled about the realm with the person of the king in early years, but soon became a fixture at Westminster. Under modern English practice known as the King's (or Queen's, as the case may be) Bench Division of the High Court of Justice, the court had, even by the time of Georgia's foundation in the 1730s, assumed its position of preeminence, especially in civil matters, exercising subject matter jurisdiction over all actions *in personam*, a power which in modern terms would have permitted the court jurisdiction over all civil actions with the exception of some few *in rem* proceedings brought in Common Pleas. See BLACK'S LAW DICTIONARY, 431 (4<sup>th</sup> ed. 1957), *Court of King's Bench*.



Common Pleas<sup>76</sup>; and Exchequer.<sup>77</sup> The General Court held first instance power<sup>78</sup> over all criminal matters and over all civil matters above the sum of 40 shillings, over which original jurisdiction lay with the Inferior or Justice Court. Where the amount in controversy exceeded £300, an appeal could be lodged as a matter of right with the governor and the Provincial Council. If the amount in controversy exceeded £500, a further appeal lay to the King in Council subject to a bond requirement and the commitment that the appellant would press the claim and respond to any adverse final judgment.<sup>79</sup>

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<sup>76</sup> Historically, Common Pleas (sometimes also designated Common Bench) was one of the four superior courts located at Westminster, functioning there as an independent body at the time of Georgia's establishment in the first half of the eighteenth century and until its amalgamation under the reformist English Judicature Acts of the late nineteenth century. It was an ancient tribunal and had its origins in the specialization and centralization of the old *aula regis* established in the times of William the Conqueror. Its exclusive jurisdiction was over all real actions brought *in rem* asserting rights in land, and it was here that *communa placita*, or common pleas, were heard, *i.e.*, claims by one subject of the Crown against another such subject. By tradition, appeals out of Common Pleas were heard in King's Bench, but these were later directed to the Court of Exchequer. Common Pleas exercised a jurisdiction wholly civil in nature, the court having no authority in criminal matters; its jurisdiction over personal actions and ejectment was concurrent with that of King's Bench. *See* BLACK'S LAW DICTIONARY, 429 (4<sup>th</sup> ed. 1957), *Court of Common Pleas*. In the process of generalization and increased imprecision which was characteristic of judicial innovations in the British North American colonies, Common Pleas was transmuted into the tribunal which exercised general and original subject matter jurisdiction over the trial of issues of fact and law where the substance of the matter in dispute was controlled by the principles of the common law. *See also* Moore v. Barry, 30 S.C. 530 (1889).

<sup>77</sup> The Court of Exchequer evolved, of course, into an administrative body and is represented in modern times by the governmental treasury. *See* EDWARD D. RE & JOSEPH R. RE, CASES AND MATERIALS ON REMEDIES 23 (5<sup>th</sup> ed., 2000).

<sup>78</sup> A Court of Session of Oyer and Terminer and General Gaol Delivery was, in the original design after the advent of royal government, to have first instance authority over misdemeanor criminal matters and was to sit twice a year. This Court was soon abolished as a separate entity, however, and its jurisdiction transferred to the General Court. *See* CHARLES COLQUIT JONES, JR., THE HISTORY OF GEORGIA 465 (Boston: 1883).

<sup>79</sup> *See* ERWIN C. SURRENCY, THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT, 16-17 (2001).

### *The Chancery Court*

It would be inappropriate here, no less than it would be futile, to attempt a full-scale description of equity jurisdiction<sup>80</sup> as it had evolved over the centuries of English history down to the time of the colonization of Georgia. Worth noting, however, are the procedural<sup>81</sup> and substantive<sup>82</sup> characteristics of chancery practice which manifested themselves in organizational

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<sup>80</sup> The interested student will find the classics of equity jurisprudence helpful in exploring this subject, including POMEROY'S EQUITY JURISPRUDENCE (Bancroft-Whitney Co., 3<sup>rd</sup> ed., 1905). Good modern overviews of the field, including some consideration of the history of the system and its relation to the common law (always necessary when equity is under examination) include EDWARD D. RE & JOSEPH R. RE, CASES AND MATERIALS ON REMEDIES (5th ed., 2000). A useful review of the Georgia application and adaptation of equity is THE ENCYCLOPEDIA OF GEORGIA LAW, (1960), Volume 10A, *Equity*, a better than three hundred page review of the history, principles, and procedural aspects of equity in Georgia.

<sup>81</sup> Broadly stated, chancery procedure was heavily influenced by the techniques of the ecclesiastical courts in England; these in turn demonstrated the influence of Roman law and practice as these were known on the continent, particularly after the Reception. One of the most dramatic distinctions between the two procedural systems –the common law on the one hand, and the equitable tradition on the other– is the strong reliance by the former on the jury, while the jury was wholly unknown in the latter. Many in the colonies at the time of the Revolution linked, fairly or unfairly, equity and the royal authority:

Hostility to the chancery courts was quite widespread in the eighteenth century. Governor William Burnet of New York (1720–8) used the chancery court as a court of exchequer, to collect the colony's unpaid quitrents. This added nothing to the court's popularity. Chancery was closely associated with executive power, in turn with the English overlords. Equity worked without a jury; thus public opinion could not effectively control the use of the court as a tool of imperial policy.

Besides, equity courts sat, as a rule, only in the capital; unlike the common law, it was not brought to every man's doorstep. Litigants complained, too, that chancery procedures were clumsy, inefficient, interminable.

LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 47-48 (1973).

<sup>82</sup> Much has been made of equity's reliance on moral precepts as the core of its system of jurisprudence. "The clerical chancellors, interpreting the language of the Roman jurists according to their own Christian philosophy, conceived of equity as synonymous with the

and institutional ways and which would, therefore, serve as a bellwethers indicating the presence (or absence) of a mature system of equity practice. Primary among these, of course, is the fact that the substantive remedies afforded by the chancery system (together with the equitable principles which informed them) were separate and distinct from the common law and in eighteenth century English legal contemplation could hardly be thought to be housed under one and the same roof. Access to equitable relief, in fact, was generally conditioned upon a demonstration of the inadequacy of legal remedies.<sup>83</sup> As an important corollary to the distinct nature of the equity jurisprudence, of course, was the principle that equity was to be administered separately from the law, by separate judges and in separate tribunals and without the intervention of juries. Kermit Hall has suggested a political dimension to the general disfavor which the chancery courts met in the British North American colonies: “Chancery courts were also controversial because governors sought in their capacity as chancellors to seek political ends rather than justice.”<sup>84</sup>

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Divine law of morality, and therefore as compulsory upon human tribunals in their work of adjudicating upon the civil rights and regulating the personal conduct and relations of individuals.” THE ENCYCLOPEDIA OF GEORGIA LAW, (1960), Volume 10A, *Equity*, at 103. With the growing maturity and institutionalization of chancery practice, however, the subjectivity of the chancellor’s foot gave way to the rationality and predictability of a full-blown system of jurisprudence in which the moralistic perceptions of an individual functionary had little or no role. *Id.*, at 104. The generally accepted bromide that equity principles look to the continent and to Roman sources has much, however, to recommend it.

<sup>83</sup> As it still is, of course. *See* O.C.G.A. § 23-1-3: “Equity jurisdiction is established and allowed for the protection and relief of parties where, from any peculiar circumstances, the operation of the general rules of law would be deficient in protecting from anticipated wrong or relieving for injuries done.”

<sup>84</sup> KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 22 (1989).

With respect to Georgia colonial experience, the salient point is the clear absence of any institutional mechanism for the administration of equity in the early years of the province.<sup>85</sup> The absence of a formal body for the administration should not be taken, however, as a signal that the system of equity was lacking in the colonial experience as well for, as Hall notes:

Equity ... had emerged in the colonies as a matter of practice if not of form.

Seventeenth century colonial lay judges exercised a kind of equity through the laxity with which they followed common law precedents. But as the English tightened control over the colonies in the eighteenth century, governors discovered that by assuming the status of chancellors they could extend the reach of their authority.

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<sup>85</sup> This is not to say, however, that the pre-existing institutions of colonial government in Georgia did not have access to or apply equitable principles for, as Justice Joseph Lumpkin – later to be designated the first Chief Justice of the Georgia Supreme Court – observed as far back as 1854:

What cases, pray, did then [in Georgia's colonial past], as now, require the powers of a Court of Equity, in the first instance? All, unquestionably, where a Common Law remedy was not adequate. To this extent, then, at least, this rule, adopted during the last century, recognizes Equity powers, as existing in the Superior Courts of this State. And, I apprehend, there never was a time, from the settlement of the colony in 1732 [sic], to the present period, when, for all practical purposes, less power than this was lodged in the Judiciary Department of the Government, under every change and form of organization. ... By reference to the early records of the older counties of the State, the fact is established, that both before and subsequent to the Judiciary Act of 1799, the Superior Courts of Georgia were in the constant habit of exercising all the Chancery powers which were usual to Courts of Equity in England.

Cook v. Walker, 15 Ga. 457 (1854).

The furor over equity practice subsided by the mid-eighteenth century, and the growing technicality of the common law system in the colonies revived interest in it. There was a "generally recognized need for equity as a part of the . . . American legal system," but it was accepted only after the colonies had either adopted viable chancery courts free of gubernatorial influence or granted this jurisdiction to the common law courts.<sup>86</sup>

The absence of such a court in Trusteeship Georgia is underscored by the attempts early on in the colony to secure such a tribunal. Even prior to the advent of royal government for the young colony, the 1751 Georgia Assembly had petitioned the Trustees for the establishment of an equity court at Savannah for those cases where law courts were inadequate; the executive of the colony –the Presidents and assistants– did not concur with the recommendation and the Trustees did not act on it.<sup>87</sup>

Georgia's colonial Court of Chancery met each term subsequent to the sessions of the General Court, and was presided over by the governor as chancellor, assisted by a master, a register and an examiner.<sup>88</sup>

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<sup>86</sup> KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 22 (1989).

<sup>87</sup> JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 204 (1917).

<sup>88</sup> ERWIN C. SURENCY, *THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT* 18-20 (2001).

*The Court of Admiralty*

The presence of an admiralty court in a colony was a clear signal of the economic and trade interests of the crown which were to be protected and advanced by this judicial body. Friedman notes that, by the early eighteenth century, at least nine separate admiralty courts had come into existence in British North America.<sup>89</sup> Since the scope of admiralty jurisdiction included the enforcement of trade laws, officials in metropolitan England were quite concerned with the judicial appointments to these courts and demonstrated a degree of administrative oversight and day-to-day involvement noticeably lacking with respect to other judicial bodies of the North American colonies. In a move which was unique among colonial judicial experiments, London created a central all-colony admiralty court with its seat in Halifax, Nova Scotia: while this court theoretically had an important role to play in the coordination of trade, tariff and navigation policy throughout all of the British colonies in North America, it was never effective in this regard.<sup>90</sup> So close was the identification of trade policy and the work of the colonial admiralty courts that the detested Stamp Act was entrusted to them for enforcement,<sup>91</sup> despite the fact that the act had nothing whatsoever to do with traditional admiralty jurisdiction. In 1763, the central Halifax admiralty court was abolished and was replaced by a series of regional admiralty courts sitting in Halifax, Boston, Philadelphia, and Charleston.<sup>92</sup> These newly created bodies were expected to coordinate their activities with the admiralty courts already created in the

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<sup>89</sup> LAWRENCE M. FRIEDMAN, *HISTORY OF AMERICAN LAW* 45 (1973).

<sup>90</sup> *Ibid.*, at 46.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

individual colonies but, as Friedman notes, the new bodies merely replaced the separate admiralty tribunals in the towns where they sat.<sup>93</sup>

Kermit Hall has described the sources of the general unpopularity which admiralty courts aroused in the colonial population:

Vice-admiralty ... developed independently of the hierarchical layering of the indigenous colonial courts ... [and] provided imperial control and commercial coherence to ocean trading. In the seventeenth century governors had acted in the capacity of vice-admirals, handling disputes arising out of maritime matters such as prize, wrecks, insurance, and seaman's wages. Parliament in 1696 authorized separate vice-admiralty courts as part of its larger program to tighten the imperial grip. These new courts brought the highly technical law of admiralty to the colonies. The judges received fixed fees and percentage payments of the goods they condemned, a practice that denied colonial assemblies control over their salaries.

The colonists resented the courts even though they offered important commercial advantages. Vice-admiralty judges, who were often Americans, placed colonial merchants and customs racketeers on short legal leashes in commercial dealings with their English masters. Moreover, the colonists, who coveted the benefits of local control through trial by jury, resented the prerogative [non-jury] nature of the vice-admiralty proceedings.<sup>94</sup>

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<sup>93</sup> LAWRENCE M. FRIEDMAN, *HISTORY OF AMERICAN LAW* 45-46 (1973).

<sup>94</sup> KERMIT HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 21-22 (1989).

The first consideration of an admiralty court for Georgia came during the Trusteeship in an unsuccessful attempt to elaborate the courts of the province along lines familiar to English practice when there was a request of the Trustees to the King in Council, in 1748, for the establishment of such a court in Georgia. Admiralty, with subject matter jurisdiction over claims arising on navigable waters, had long been associated with periods of international stress and belligerence: it was the admiralty court in British practice which exercised a monopoly of authority over the processing of prize claims, the forced sale of belligerent vessels for distribution of the proceeds to the victorious crew.<sup>95</sup> After it became known to the Trustees that a recommendation by the commanding officer of the British troops at Frederica for the appointment of a judge to this court had been made, the Trustees interposed the objection that, under their charter, only the Trustees themselves could effect such an appointment in Georgia. It was at this point that it was discovered that no such court existed in the colony at all, whereupon the Trustees approached the King in Council for the establishment of the court for Georgia. The easing of international tensions and the subsequent withering away of Frederica's military significance took the steam from this proposal which was not granted by the crown; the Trustees, for their part, did not press the matter further and no admiralty court appeared in Georgia until after 1754 and the surrender of the charter by the Trustees.<sup>96</sup>

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<sup>95</sup> See LAWRENCE M. FRIEDMAN, *HISTORY OF AMERICAN LAW* 46 (1973).

<sup>96</sup> Trevor Reese states flatly that no admiralty court was created in Georgia until the advent of royal government, and this assertion has about it the ring of authenticity. TREVOR R. REESE, *COLONIAL GEORGIA: A STUDY IN BRITISH IMPERIAL POLICY IN THE EIGHTEENTH CENTURY* 27 (1963). McCain, on the other hand, seems to indicate that such a tribunal was present in Georgia at least as early as 1748. See JAMES ROSS MCCAIN, *GEORGIA AS A PROPRIETARY PROVINCE: THE EXECUTION OF A TRUST* 122 (1917). Surrency seems to come down on the side of Reese, noting that the first session of the admiralty court was held January 16, 1755, as a result of Governor Reynolds organizing efforts. ERWIN C. SURRENCY, *THE CREATION OF A JUDICIAL SYSTEM: THE*



The admiralty court sitting in Savannah enjoyed a continuous existence from the time of its creation until the time of the Revolution, a period of about twenty years. Appeals from this court were lodged in the High Court of Admiralty of England. Generally, the court had exclusive authority within the colony of those matters traditionally relegated to the English admiralty courts, including enforcement of the trade acts, disputes respecting the wages of seamen, salvage claims and other maritime matters, customarily defined as all matters arising on navigable waters. Here, the governor, sitting in his ex officio capacity of vice admiral for the colony, was assisted by a judge-advocate, an advocate-general, a marshal and register.<sup>97</sup>

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HISTORY OF GEORGIA COURTS, 1733 TO PRESENT 20 (2001). The truth of the matter appears to lie with Reese and Surrency.

<sup>97</sup> Trevor R. Reese provides a succinct overview of the work of the admiralty court in colonial Georgia:

During the Trusteeship period there had been no admiralty court in Georgia, but one was established in January 1755, and consisted of four members, the Governor granting commissions to a judge, an advocate-general, a marshal, and a registrar of the court. It tried breaches of the Acts of Trade, had jurisdiction over cases concerning salvages, mariners' wages, piracy, enemy ships taken as prizes, and over other maritime affairs, and "proceeded according to the course of the civil law and the established method of determination used in Great Britain and other maritime nations."

TREVOR R. REESE, *COLONIAL GEORGIA: A STUDY IN BRITISH IMPERIAL POLICY IN THE EIGHTEENTH CENTURY* 27 (1963). *See also* ERWIN C. SURRENCY, *THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT 20* (2001), on the work of the admiralty court in colonial Georgia after the conclusion of the Trusteeship.

*The Inferior (or Justice) Court*

These royal courts, sometimes referred to as Courts of Conscience,<sup>98</sup> exercised authority over all civil claims up to £8, and exclusive civil jurisdiction over controversies up to 40 shillings, beyond which an appeal lay to the General Court in Savannah. After the dissolution of the Court of Session of Oyer and Terminer and General Gaol Delivery and the amalgamation of that court with the General Court, the justices of the Courts of Conscience were assigned a supporting role for the criminal functions in the General Court and were granted power in emergencies to try charges against slaves under special writs of oyer and terminer.<sup>99</sup>

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<sup>98</sup> The use of this term with respect to the Inferior Courts of colonial Georgia has been the occasion of no small degree of confusion. Traditionally, “Court of Conscience” was descriptive of chancery courts exercising equitable jurisdiction; so used, the term was one of description and not a formal designation. *See Harper v. Clayton*, 84 Md. 346 (1896), cited in BLACK’S LAW DICTIONARY, 429 (4<sup>th</sup> ed. 1957), *Court of Conscience*. The Georgia usage seems to relate back to the English “courts of request” established by the English Parliament in certain localities, having limited jurisdiction over minor debts. *See BLACK’S LAW DICTIONARY*, 435 (4<sup>th</sup> ed. 1957), *Courts of Requests*. These were supplanted by the modern English county courts in the 1846 reforms, while their Georgia analogues, the justice of the peace courts, lived on until the creation of the Magistrate Courts in each of Georgia’s one hundred fifty-nine counties under the Georgia Constitution of 1983. *See* 1983 GA. CONST. Art. 6, § I, ¶ 1.

<sup>99</sup> Reese summarizes the place in the judicial hierarchy of the “Court of Conscience”:

By an Act of April 1760, Courts of Conscience were designed to avoid the heavy expense incurred in the ordinary method of suing for and recovering small debts in the General Court. Every settlement had its own justices of the peace commissioned by the Governor to determine in these courts all actions of debt and damage, except those concerning titles to land, in which the amount involved did not exceed £8 sterling.

Significantly, the winds of revolution were to blow away colonial objections to and discomfort with the creakiness and excessive technicality of common law pleading as well as the terrible –to American eyes– specter of judges sitting without juries as a matter of course. Within a few short years after the victory at Yorktown and the Peace of Paris in 1783, Georgia law had radically simplified procedure in the common law courts<sup>100</sup> and, somewhat later, had extended the right to jury trial even in equity matters.<sup>101</sup> Before the American Revolution, however, these radical measures were beyond the political grasp of the colonists on the Savannah. However, they could –and they did– avoid the disincentives of English legal practice by withdrawing into an arbitral practice which facilitated the expression of community values, in ways comprehensible to the community, and in tribunals which themselves were constituted by and of the community.

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<sup>100</sup> For instance, common law demurrer practice –the hypertechnical method whereby the sufficiency of opposing pleadings could be contested procedurally (and without the intervention of a jury) was discouraged by a statute enacted in 1782, even before the peace with England had been concluded in Paris. Georgia Laws 1782, *Watkins Digest*, 339, cited in Surrency, *op. cit. supra*, at 207. Major procedural reforms intended to streamline and simplify common law practice were registered by the Judiciary Act of 1797, amended two years later, which addressed the entire civil pleading and trial process, beginning with the provision that pleadings were to be “plainly, fully and distinctly” set forth. Georgia Laws 1799, 14.

<sup>101</sup> See generally *Cawthon v. Douglas County*, 248 Ga. 760 (1982), regarding the historical evolution in Georgia of the statutory right to a trial by jury of fact issues arising in equitable proceedings, especially as it appeared in the Code of 1895, § 4849. It appears that the statutory right to elect trial by jury in equity cases was deleted at the time of the enactment of the Code of 1933 which in its §37-1104 made no reference to such a right. An additional prerogative extended to juries in Georgia by the state’s first constitution (that of 1777) was the right to pass on contested issues of law, a provision unheard of in English practice. GA. CONST., 1777, § 279. The Georgia Judiciary Act of 1778, implementing the terms of the 1777 Constitution, provided that courts were to “proceed with a jury in summary way on petition, in all disputes of a civil nature,” a mandate to reverse the objectionable English practice. See the discussion in ERWIN C. SURRENCY, *THE CREATION OF A JUDICIAL SYSTEM: THE HISTORY OF GEORGIA COURTS, 1733 TO PRESENT*, 50-51 (2001).

## Section 2. An Arbitration in Colonial Georgia: The Salzburger Experience in Ebenezer

When James Edward Oglethorpe –a leading force in the establishment of Georgia, Britain’s last colony in North America– met the arrival of the transport ship *The Purisburg* on March 11, 1734, at Savannah’s river harbor, he knew that the vessel brought more than the material supplies and provisions so badly needed by the infant English outpost where the Savannah River mouthed into the Atlantic Ocean: it delivered as well the first complement of German Protestant refugees –some seventy-eight souls– from Roman Catholic principalities in Austria and southern Germany.<sup>102</sup> These –collectively known in history as the “Salzburgers”<sup>103</sup>– had been financed in their flight from their homelands by the Anglican Society for the Propagation of Christian Knowledge, a major missionary adjunct of the Church of England in the eighteenth century. A hardy and robust people, the Salzburger had, for the most part, been farmers in their native homes and were well adapted to the hardships which life on the Georgia frontier promised them that spring of 1734; their strong Lutheran ethics recommended them to the Society’s financiers perhaps even more than their agricultural traditions and backgrounds.

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<sup>102</sup> The history of this group, from their expulsion and during their wandering in Europe until their final arrival in London before departure for the new colony of Georgia, is rehearsed in P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 1-59 (Baltimore, 1855). In the first two decades after its foundation, the colony accepted a large number of German-speaking Protestants from a variety of regions in central Europe. *See generally* GEORGE FENWICK JONES, *THE GEORGIA DUTCH: FROM THE RHINE AND DANUBE TO THE SAVANNAH, 1733-1783*, 33-67 (1992).

<sup>103</sup> At the time of the expulsion of the Protestants from the archbishopric of Salzburg in the period 1729-1732, that principality consisted of lands in the regions of Friessingen, Ratisbon [Regensburg], Passau, Chiemre, Seckau, Lavant, Briscen, Gurk and Neustadt, an area vastly larger than that which today constitutes the *Land Salzburg* in the Austrian Federal Republic. *See* P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 4 (Baltimore, 1855). The main body of German-speaking Lutherans who were to become known in history as the “Salzburgers” in fact left from Bavarian Augsburg in October of 1733. KENNETH COLEMAN, *COLONIAL GEORGIA: A HISTORY* 40 (1989).

Oglethorpe and the authorities in London also saw in the Salzburgers a potential military and economic bulwark against Spanish advances from south of the Florida-Georgia boundary line or against intrusions by Creeks or Cherokees to the north and west of the colonial capital.

Oglethorpe's vision of the Salzburgers as the young colony's first line of defense was realized when, shortly after their arrival in the New World, they were assigned –and agreed to– an isolated venue for the German-speaking outpost northwest of Savannah and along the banks of the Savannah River at a place soon known as Ebenezer,<sup>104</sup> near the present town of Springfield in modern Effingham County, Georgia.<sup>105</sup>

In their isolated location on a bluff overlooking the muddy Savannah River, the German colonists were free to recreate (or better, *perfect*) the societies which they had left behind them in Central Europe, and soon a successful community –reinforced by additional shiploads of German Protestants who periodically appeared at the Savannah harbor– developed.<sup>106</sup> German in

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<sup>104</sup> The name –often appearing as “Eben-Ezer” in documents of colonial vintage– is from the Hebrew and is translated as “Rock of Help,” an expression of the profound motivations which brought the German farmers to the wilderness of near-tropical Georgia. See P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 63 (Baltimore, 1855): “After singing a psalm,” upon first arriving at the site of the new town, the colonists “set up a rock, which they found upon the spot, and, in the spirit of the pious Samuel, named the place Ebenezer, (the stone of help,) [sic] for they could truly say, ‘Hitherto the Lord hath truly helped us.’”

<sup>105</sup> GEORGE FENWICK JONES, *THE GEORGIA DUTCH: FROM THE RHINE AND DANUBE TO THE SAVANNAH, 1733-1783*, 35 (1992). See also JAMES ETHERIDGE CALLAWAY, *THE EARLY SETTLEMENT OF GEORGIA* 23-24 (1948): “Following his usual plan of planting settlers in the most strategic spots, Oglethorpe placed them on a spot near two rivulets surrounded by woods and meadows, sixteen miles to the north and west of Savannah; and although this is not the reason given in the contemporary accounts, by an examination of early maps it is evident that Ebenezer was placed squarely on the path customarily taken by the Indians when they attacked Carolina.”

<sup>106</sup> GEORGE FENWICK JONES, *THE GEORGIA DUTCH: FROM THE RHINE AND DANUBE TO THE SAVANNAH, 1733-1783*, 114-138 (1992) (Chapter Five, *Success at Ebenezer*).

religion, German in language, and German in its social organization as a small, essentially theocratic state, the Salzburger eschewed contact with the English legal system represented by the unfamiliar and alien court structure functioning in Savannah.<sup>107</sup> Rather, the Salzburger community persistently looked inward to resolve disputes on its own terms and in its own way. Heinrich Melchior Mühlenberg, the North American Lutheran patriarch with his seat in Pennsylvania, reflected the distaste and aversion<sup>108</sup> with which the Lutherans in North America

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<sup>107</sup> A. G. Roeber, *Germans, Bench, and Bar in the South, 1715-1770*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* 208 (David J. Bodenhamer & James W. Ely, Jr., eds., 1984) (“...[T]hat decision [not to integrate into the English legal system] was one of [the Salzburger’s] own choosing.”):

Moreover, the history of both bench and bar in Georgia had not been one that would have encouraged immigrants to seek out these institutions, even if they had been so inclined. During the same decade that the Salzburger were settling in, Francis Moore noted in his diary regarding Savannah that “there are no Lawyers allowed to plead for Hire, nor no Attorneys to take Money, but (as in old times in England) everyman pleads his own Cause.” Though perhaps regarded as a boon by opponents of lawyers, this absence of a genuine bar meant that “everyman” who pleaded was best served when he both knew the English language and also had influential friends.

*Ibid*, at 209. It does not appear, especially in the formative years of Ebenezer’s existence, that there was even a minimal presence of English justice in the Ebenezer settlement. See Thomas Stephens, *A Brief Account of the Causes that have retarded the Progress of the Colony of Georgia* (London, 1743), reprinted in TREVOR R. REESE, *THE CLAMOROUS MALCONTENTS: CRITICISMS & DEFENSES OF THE COLONY OF GEORGIA, 1741-1743*, 281 (1973), where Stephens laments the fact that there was not so much as a single official magistrate in Ebenezer as of 1743.

<sup>108</sup> Avoidance of English law and legal institutions did not equate to ignorance of them, however.

German immigrants studied English and colonial laws to protect themselves against those who would use the courts against them. In 1752 Henry Melchior Muhlenberg [sic] traveled to New York and saw how badly English lawyers had cheated Lutherans out of their land and church buildings. When he returned to Pennsylvania he initiated a long process to acquire a charter of incorporation for St. Michael’s Lutheran Church in

viewed colonial American civil justice: “[a]ccording to the English laws,” he wrote in 1745, “when a disputed matter has long been before the court and the lawyers of both parties have grown tired of it, seeing perhaps that their clients have been already plucked bare, the judges usually refer the business to an arbitration.”<sup>109</sup> If arbitration was the end result of the English legal machinery, the Salzburger may well have reasoned, why not abbreviate the process and institute arbitral mechanisms *within* the German community?

Gaps in the historical record make it impossible to determine with precision when the Salzburger community at Ebenezer first resorted to internal arbitration as a method of civil dispute resolution. It is clear, however, that as early as 1741 the German enclave north of Savannah had evolved a system of folklore arbitration which served its needs sufficiently well to keep the German Protestants out of the English (and, worse perhaps, *Anglican*) courts based in Savannah. When Benjamin Martyn wrote his broadside *An Impartial Enquiry into the State and*

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Philadelphia, which he hoped would protect them from a similar fate. Muhlenberg [sic], Conrad Weiser, and Emmanuel Zimmerman requested that David Henderson, a young lawyer from Berks County [Pennsylvania], write a legal handbook for the Germans, explaining the essential English and colonial laws. The German printer Henry Miller translated and published the book, whose central theme is property rights, in Philadelphia in 1761. In addition, the German press and church ministers began to emphasize writing wills in America.

AARON SPENCER FOGLEMAN, *HOPEFUL JOURNEYS: GERMAN IMMIGRATION, SETTLEMENT, AND POLITICAL CULTURE IN COLONIAL AMERICA, 1717-1775*, 143-144 (1996).

<sup>109</sup> HALLESCHER NACHRICHTEN, OR, REPORTS OF THE UNITED GERMAN EVANGELICAL LUTHERAN CONGREGATIONS IN NORTH AMERICA, SPECIALLY IN PENNSYLVANIA, Vol. I at 188 (W. J. Mann, B. M. Schmucker and W. Germann, eds., *trans.* C. W. Schaeffer, Reading, Pa.: 1882) (letter of Mühlenberg to Halle, Dec. 12, 1745), *quoted* in A. G. Roeber, *Germans, Bench, and Bar in the South, 1715-1770*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* 221 (David J. Bodenhamer & James W. Ely, Jr., eds., 1984).

*Utility of the Province of Georgia*, a 1741 response to criticisms of the young colony made by malcontents to the London authorities, he found that the German immigrants demonstrated little need for the types of legal structures maintained by the English authorities in the colonial capital. “Though there is no regular Court of Justice” among them, he wrote, the Salzburgers “live in Sobriety, [and] they maintain Great Order and Decency. In case of any differences, the Minister calls three or four of the most prudent Elders together, who in a summary Way hear and determine as they think just, and the Parties always acquiesce with Content in their Judgment.”<sup>110</sup>

Reliance on lay elders of the community, however, was not the exclusive method of arbitration employed by the Salzburgers of Ebenezer. George Whitefield, the great evangelical preacher who from his base at the Bethesda School outside Savannah was to launch one of the great revivals of the eighteenth century in North America, noted that the Salzburgers “are . . . blessed with two such pious ministers as I have seldom seen. They have no courts of jurisdiction, but all differences are immediately settled by their pastors.”<sup>111</sup> This same pattern of clerical arbitration of civil and religious disputes was apparent in the intervention by Mühlenberg into the dispute in Ebenezer between Pastor Rabenhorst and Pastor Triebner which festered in the first half of the 1770s. Mühlenberg’s diary reflects his dispatch from Pennsylvania as the sole arbitrator in their disagreement, his arrival at the Ebenezer community in Georgia, the express submission of the contesting parties to the arbitral authority of the Pennsylvania divine, and their

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<sup>110</sup> See A. G. Roeber, *Germans, Bench, and Bar in the South, 1715-1770*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* 209 (David J. Bodenhamer & James W. Ely, Jr., eds., 1984), *quoting* Martyn as cited in CHARLES C. JONES, *THE DEAD TOWNS OF GEORGIA* 47 (1974).

<sup>111</sup> See A. G. Roeber, *Germans, Bench, and Bar in the South, 1715-1770*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* 208-209 (David J. Bodenhamer & James W. Ely, Jr., eds., 1984), *citing* P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 110 (Baltimore, 1855), *quoting* a 1738 letter of George Whitefield.



willingness to obey his decision in the matter. A more perfect depiction of early Georgia –indeed, of American colonial– arbitral procedure is difficult to imagine. Certainly, no arbitration in Georgia before the end of the eighteenth century is better known.

### *Mühlenberg's Arbitration at Ebenezer*

The Lutheran colony at Ebenezer in the first three decades of its existence had become stable and well established and, with application of the industry and hard work for which the Salzburgers were regularly praised by General Oglethorpe,<sup>112</sup> the Protestant enclave on the Savannah River north of the colonial capital had become quite comfortable and prosperous.<sup>113</sup> With the improvement in their material circumstances, however, tensions and divisions had developed in the little Lutheran community<sup>114</sup> and these, before 1774, had erupted in personal

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<sup>112</sup> Strobel says that the General's attitude toward the German Protestants was marked by the "kindness and frankness of an affectionate parent." See P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 88 (Baltimore, 1855); see also GEORGE FENWICK JONES, *THE GEORGIA DUTCH: FROM THE RHINE AND DANUBE TO THE SAVANNAH, 1733-1783*, 38 (1992) ("Despite the Salzburgers' difficulties, Oglethorpe . . . had only positive things to say about them.").

<sup>113</sup> See GEORGE FENWICK JONES, *THE GEORGIA DUTCH: FROM THE RHINE AND DANUBE TO THE SAVANNAH, 1733-1783*, 114-138 (1992) (Chapter Five, *Success at Ebenezer*).

<sup>114</sup> The connection between the material success of the experiment at Ebenezer and the sad divisions which arose in the community seems to have been a rather direct one: the expansion of the temporal holdings of the community was one of the major factors requiring the assignment of additional clerical leaders to the Lutheran colony in Georgia, and it was the tension between these –especially Christian Rabenhorst and Mr. Christoph Friederich Triebner– which set the stage for the rivalry underlying the community's discontent. See P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 151 (Baltimore, 1855) ("Mr. Tribner [sic] was a young man of fine talents, but very impetuous in his character, and seems to have been possessed of a small share of the humility and piety which characterized his predecessors . . . His selection as assistant pastor was attended with the most disastrous consequences to the congregation; for he

attacks and even threats of physical violence involving factions which had gathered around the two ministers then in Ebenezer, Christian Rabenhorst and Christoph Triebner. In the commission issued on February 2, 1773, to Mühlenberg to act as arbitrator in the matter, Johann August Urlsperger at the Lutheran center back in Germany had described the tensions in the *evangelisch* community in Georgia:

For a long time, now, there have been unfortunate disputes between the present preachers at Eben Ezer [sic], Mr. Christian Rabenhorst and Mr. Christoph Friederich Triebner, disputes which have not only caused harmful disquiet in their own minds and distress toward each other but which had even given rise to grave divisions within the congregation, concerning which such flatly contradictory reports and complaints have been sent to London and Augsburg that we have been at a loss to know what to say or think. Therefore, His Reverence Court Preacher Ziegenhagen, that old patron of Eben Ezer whose signature will be found at the end of this document, proposed, in order to settle this harmful dispute, that Pastor Heinrich Melchior Mühlenberg of Philadelphia, be entreated not to grudge the trouble of making a journey to Eben Ezer and by his presence and God's help to restore the former order and peace by making an impartial investigation and settlement of the existing strife. . . . To this end, in the hope of favorable acceptance of this commission, he gives to the said Pastor Mühlenberg, in God's Name, with the full approval of the Reverend Court Preacher Ziegenhagen who is very dear to Eben Ezer and with the same authority and

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succeeded in raising ... turmoil and strife among the members . . .”).

effect as if he himself were present, full power, according to the more detailed instructions transmitted to him, to hear the pastors there, concerning their differences, to investigate and adjust them impartially and, as need shall inquire, to enlist the assistance of such members of the congregation who he in his own prudence shall consider competent thereto.<sup>115</sup>

In addition to this warrant authorizing Mühlenberg to act on behalf of the Lutheran authorities in Augsburg, the Philadelphia pastor was issued formal “Instructions” from Urlsperger. “Pastor Mühlenberg is empowered,” the Instructions ran:

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<sup>115</sup> HENRY MELCHIOR MÜHLENBERG, *THE JOURNALS OF HENRY MELCHIOR MÜHLENBERG*, Vol. II, 556-557 (Theodore G. Tappert & John W. Doberstein, *trans.*, 1942). In the spring of 1742, Heinrich Melchior Mühlenberg, a thirty year old Lutheran pastor from Halle, had been dispatched to North America by German church authorities at the urgent request of three small German-speaking Lutheran congregations in the Philadelphia area. A storm near the end of his fourteen week voyage to America fortuitously brought him to the harbor of Charleston, affording him an unexpected but not unwelcome opportunity to visit, but not for the last time, the Lutheran community on the Georgia side of the Savannah River at Ebenezer. Mühlenberg’s relation with the small Georgia mission was to continue virtually until the time of his death in the fall of 1787: one of his primary functions in North America was to serve as the official and formal link between, on the one hand, the German Lutheran communities in the colonies – and these ranged from Vermont to Georgia– and, on the other, the Francke Institutes (which financed his presence in the New World) and the ecclesiastical superiors of the Synod of Wernigerode under whose supervision he exercised religious authority in America. Mühlenberg’s diaries, kept meticulously for the forty-five year period from his arrival in America until his death well after the Revolution, have been a gold mine for historians ever since: detailed and insightful, they recorded the colonial and post-revolutionary American scene with the eye of one who sensed that he was writing for the ages and whose duties exposed him to the entire geographical spread of the British colonial world, to the young United States, and to all ranks of the societies which inhabited them. *See Ibid*, Vol. I, at vii-xxiv (Translators’ *Introduction*).

1. To hear and judge with utmost impartiality the complaints of both preachers and, if necessary, receive the testimony of members of the congregation concerning the same.
2. To diminish as far as possible the number of complaints and reduce them to a few major complaints which, so far as I know, will boil down to the charge that Mr. R[abenhorst] has been self-seeking, violent, and not only selfishly neglecting, but obstructing the necessary discipline of the church; as concerns Mr. Tr[jebner], however, that he likewise has been violent, headstrong, and unable to keep peace when Mr. R[abenhorst] offered it to him ... .<sup>116</sup>

The Instructions issued to Mühlenberg made it clear, in addition, that not only Christian harmony and peace were at stake in the contentious circumstances prevailing at Ebenezer. Involved as well were civil property rights in which both the contending factions in Georgia had an interest as well as the Lutheran authorities in Germany:

... Since the administration of the mill establishments [in Ebenezer] has also been a bone of much contention, these complaints are also to be heard and settled. In the main, however, the revenues of the mill establishments must remain under the direction of London and Augsburg, for I know of no other origin of these establishments [the mills] than the charitable gifts gathered in Europe and sent to Eben-Ezer, especially by the hand of my late papa [Samuel Urlsperger]. Therefore these establishments must remain permanently in the old connection

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<sup>116</sup> *Ibid*, Vol. II, at 557.

with Europe and accounts must be rendered and directions followed as to their use for the benefit of Eben-Ezer.

... All the rest is left to the discretion of the authorized agent who will endeavor with God's gracious help to establish the bond of peace upon a firm foundation. To this end he shall also bring the two gentlemen to an agreement with regard to all work and the manner in which it should be done. However, if all his efforts should fail to bring about harmony, he shall render an impartial report and opinion concerning the entire matter, at which time he will be advised concerning the further disposition of the case, etc., etc.<sup>117</sup>

Despite his misgivings that he was "incapable, unsuited, and inadequate to carry out such a commission in accord with the earnest wish of the Reverend Fathers [in Germany],"<sup>118</sup> Mühlenberg undertook the hazardous journey to Savannah during which he almost lost his life in a storm while on board ship,<sup>119</sup> arriving on October 27, 1774, in the Georgia capital after a short delay in Charleston.<sup>120</sup>

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<sup>117</sup> *Ibid*, at 558.

<sup>118</sup> *Ibid*, at 559.

<sup>119</sup> *Ibid*, at 595.

<sup>120</sup> While in Charleston awaiting sea passage to Savannah, the pastor had occasion to meet with the Lutheran community in that sister city to Georgia's capital; Mühlenberg assisted in preparing a "constitution" for the German immigrants in South Carolina which contained an arbitration provision setting forth terms very much like those under which he had himself been subjected by the authorities in Germany:

...in Case, which God forbid!, there should happen Dispute or Disturbance between the Minister and the congregation, no Party can nor shall be her own Judge, but the Minister shall have the Privilege to chuse [sic] one or two impartial able Arbitrators, and the Vestry or congregation shall have the same Liberty to chuse [sic] one or two impartial prudent Arbitrators, who together may inquire into, discuss and decide the Matter, or chuse

Among Mühlenberg's first acts in Georgia was to dispatch virtually identical letters to the two contending Lutheran clergymen, inviting them to visit him since he had remained in residence in Savannah as a means of maintaining his neutrality between the two contending camps up the river in Ebenezer.<sup>121</sup> During this interval in Savannah, Mühlenberg learned that the complications of the Ebenezer situation were compounded with a potential dispute with the English authorities over the title and ownership of Jerusalem Church which had been erected by the Lutheran community at its enclave in Ebenezer. The church, owing in large part to the unfamiliarity of the German Lutherans with the English language and English legal procedure, apparently rested on lands which under Georgia law were held by the Church of England.<sup>122</sup> Recognizing that the unrest and dissension within the Lutheran community could well draw the attention of English authorities to this unrelated church property issue, Mühlenberg began his arbitral office with increased intensity. The Philadelphia representative met with both Pastor Rabenhorst and Pastor Triebner on October 31, 1774, while still in Savannah<sup>123</sup> and as his first function secured their agreement –as would any good arbitrator– as to the authenticity of his warrant and his letters of Instruction from Urlsperger: “I then asked them whether they

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[sic] an Umpire if they can not agree, and both parties shall acquiesce in their award.

*Ibid*, at 575.

<sup>121</sup> Rumors were afoot even before his arrival on Georgia soil that Mühlenberg was so Calvinist and Reformed in his views that he would be unfit to act as arbitrator in the dispute dividing the Lutheran community in Georgia. It was for this reason that Mühlenberg declined the invitation of Johann Zubly, the Reformed pastor in Savannah, to be his guest while in the city. *Ibid*, at 595-596. Despite this inauspicious beginning, Mühlenberg and Zubly in fact managed to cooperate during the Lutheran pastor's visit in Savannah and the two became friends, as discussed *infra*.

<sup>122</sup> *Ibid*, at 599.

<sup>123</sup> *Ibid*, at 598.

acknowledged them to be authentic, whether they recognized me as being empowered, and whether they would permit me to act in accordance with my authority as far as God would enable me.”<sup>124</sup> Not content with oral indications of agreement from both of the Lutheran ministers, Mühlenberg obtained the written agreement of both of them to the same effect.<sup>125</sup>

Rabenhorst signed a statement establishing that “I have read this thirty-first day of October, 1774, the warrant given through the wise providence of God by the Venerable Fathers to the beloved Pastor Mühlenberg, and hereby acknowledge that I will cheerfully and most willingly yield obedience to it, to which I testify with my signature.” Similarly, Triebner provided Pastor Mühlenberg with a written statement that he “willingly agree[d] to acquiesce in and obey the warrant furnished to the Rev. Pastor Mühlenberg by the most beloved Reverend Fathers, the Rev. Court Preacher Ziegenhagen and the Rev. Senior Urlsperger.”<sup>126</sup> At their first meeting of October 31, Mühlenberg also instructed the two pastors to reduce their complaints against each other to a written form, following which, Mühlenberg indicated, he would set the matter down for “a hearing of the case.”<sup>127</sup>

Mühlenberg’s belief, if any he ever had, that the arbitration in Georgia would conclude easily was shaken when he later learned after his first meeting with Pastor Triebner that the latter had soon repaired to an “English judge,” basically to obtain a “second opinion” regarding the procedure before Pastor Mühlenberg and the rights of the local Lutheran community.<sup>128</sup>

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<sup>124</sup> *Ibid*, at 599.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Ibid*, at 602.

Mühlenberg's discomfort with Triebner was increased even further when, awaiting the written submission of the two pastors, Mühlenberg received a letter dated at Ebenezer on November 4, 1774, which, although reiterating Triebner's willingness to be obedient to Mühlenberg's decision, also informed the Philadelphia preacher that "a certain friend and well-wisher in Savanna [sic], Mr. Joseph Ottolenghe, proposed to me repeatedly, even before your arrival, that our dispute could be settled more agreeably and with greater impartiality by a number of *gentlemons* [sic] in Savanna [sic] rather than in Eben-Ezer [sic]."<sup>129</sup>

In his response to Triebner, Mühlenberg did not acknowledge the proposal of "English" arbitration, instead assuring his "Reverend Brother" that "it will be my endeavor to act in accord with justice and equity and truth and love, as before the all-seeing-eye of God, and that I shall pray God for the grace to do so."<sup>130</sup> Capitalizing upon the delay in Savannah before moving on up the river to Ebenezer, Mühlenberg took the opportunity, quietly in all probability, to collect the available documentation regarding the question of the property title to the Lutheran church in Ebenezer, finding to his dismay that the original grant specifically provided that the church erected upon the lands would be dedicated to the "Using and Exercising divine Service according to the Rites and Ceremonies of the Church of England within the said Parish and their Successors forever."<sup>131</sup> "Now," Mühlenberg lamented, "there is an end of it. I see no help. From the above extract from the *grant* it is clear that since April 2, 1771, the so-called Chief Mother

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<sup>129</sup> *Ibid*, at 604.

<sup>130</sup> *Ibid*, at 605.

<sup>131</sup> *Id*.



Church in Eben-Ezer and its appurtenances have been under the *jurisdiction* of the established Church of England.”<sup>132</sup>

On November 7, Mühlberg took a chaise up to Ebenezer where he was to stay with Pastor Rabenhorst. While there, he received the written statement of “complaints of Pastor Triebner and his party” –close in both spirit and letter to a modern demand for arbitration– which rehearsed a litany of complaints regarding personal slights and insults against Triebner allegedly made by Rabenhorst and members of his faction in the community.<sup>133</sup> In addition, the formal complaint alleged a number of liturgical and doctrinal violations by Rabenhorst and alleged that Rabenhorst had secured to his own benefit the profits of the ministers’ glebe which had been purchased by the German Lutheran authorities for the benefit of the Lutheran congregation in Ebenezer.<sup>134</sup> Triebner also alleged that the tension had grown so great that in June of 1774 Rabenhorst had arranged a fraudulent parish election for new church officers but had excluded the party of Pastor Triebner, thereby depriving the Triebner group of their lawful

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<sup>132</sup> *Ibid*, at 606-607 (emphasis in original). In exasperation, Mühlberg referred to the thorny issue of the title to the Jerusalem Church at Ebenezer, stating that “I still do not know who was the real author of this affair and who tied this knot.” Showing not a little pique at Triebner’s actions, he continued: “This is what happens when one selects a number of English *gentlemen* [emphasis original] in Savanna [sic] as patrons and friends who ... can settle the Eben Ezer ‘dispute more agreeably and with greater impartiality than a German who has been authorized by the Reverend Fathers’ [in Germany] ... . Mr. Tr[iebner] was trying to stir up trouble somehow, that he should acknowledge my warrant by signing it on October 31 and then, immediately after taking leave of me on November 2, visit this gentleman (identified as “Squire O[ttoleng]he, ... a Portuguese Jew now a member of the High [Anglican] Church”) and confer with him about the whole thing ... .” It appears that the eminent Lutheran leader was not wholly above a touch of jealousy.

<sup>133</sup> *Ibid*, at 607.

<sup>134</sup> *Ibid*, at 608.

minister.<sup>135</sup> A similar written statement dated November 5, 1774 –much in the nature of an answer and counterclaim in modern arbitral and procedural parlance– was received from Pastor Rabenhorst and from the deacons of the church who supported him. Rabenhorst alleged that his opponent, in addition to unchristian and unbrotherly behavior, had misrepresented the salary arrangements made on his behalf and complained of Triebner’s allegations regarding the alleged mismanagement of the mill establishments by Rabenhorst. “In addition to the dishonor inflicted upon my honest name,” Rabenhorst went on, “I was represented as a false teacher and a perverter and destroyer of the congregation. The blame for the division of the congregation is cast upon me, whereas it was caused by his [Triebner’s] own obstinacy and tyranny, in that he dreadfully abused the preaching of the Word of God and the holy sacraments of Baptism and the Lord’s Supper to accomplish this purpose. This last [the Lord’s Supper] he refused to me myself because I reported the great distress of Eben-Ezer to the Venerable Fathers [in Germany] and attributed its difficulties to Triebner.”<sup>136</sup>

While reviewing the various submissions made to him by the parties, Pastor Mühlenberg took counsel from Johann Zubly, the Swiss Calvinist Reformed minister of a congregation in Savannah<sup>137</sup> who maintained close and fraternal ties with the Germans in Ebenezer.<sup>138</sup> Zubly,

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<sup>135</sup> *Id.*

<sup>136</sup> *Ibid.*, at 609. The mutual recriminations of the respective parties (and their adherents) against each other are summarized in P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 152-155 (Baltimore, 1855).

<sup>137</sup> On the life and work of Johann Joachim Zubly generally, see RANDOLPH M. MILLER, “A WARM AND ZEALOUS SPIRIT”: JOHN J. ZUBLY AND THE AMERICAN REVOLUTION, *A SELECTION OF HIS WRITINGS* (1982). While it is almost inescapably certain that Presbyterians were present in Savannah prior to Zubly’s appearance there in 1760, the arrival of the young Swiss Calvinist minister served as a catalyst to coalesce the Reformed community in Georgia’s colonial capital. Friction inevitably developed between Zubly and the Anglican establishment in the city and this fact may have

apparently concerned that the church procedure for which Mühlenberg had been commissioned might not have validity before the English authorities in the English colonial courts, approached Mühlenberg with a possible resolution of this potential defect:

The Reverend Doctor Zubly made a tentative suggestion, namely, that it might possibly be necessary for the leaders or representatives to arrange an arbitration in accord with local custom, to appoint me, and perhaps one or two more if I so desired, as arbitrators, and to bind both sides to abide by the decision and final judgment of the arbitrator or arbitrators with legal bonds or obligations for a sum of money.<sup>139</sup>

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contributed to Zubly's growing republican sentiment. With the advent of the Revolution, Zubly –arguably the best-educated citizen of pre-Revolutionary Savannah– became a leading spokesman for American interests but, ultimately, he balked at political separation from England. Zubly served in both the colonial legislature and in the Continental Congress as a representative of Savannah and Chatham County but left the national legislature around the time of the Declaration of Independence and rode out the war in British-occupied Savannah. He died there during the Revolution, in July of 1781, an honored and revered figure but never again admitted to the highest councils of government, Whig or Tory. *See ibid*, 1-27. Today's Independent Presbyterian Church in Savannah is the direct lineal heir of Johann Joachim Zubly's labors in Georgia before the Revolution.

<sup>138</sup> *Id.* *See also* HENRY MELCHIOR MÜHLENBERG, *THE JOURNALS OF HENRY MELCHIOR MÜHLENBERG*, Vol. II, 609-610 (Theodore G. Tappert & John W. Doberstein, *trans.*, 1942).

<sup>139</sup> *Ibid*, at 610. J. J. Zubly was not one to give advice which he himself was unwilling to take. When war came to Georgia in 1775-1776, Zubly remained in Savannah during the periods when the city was under British occupation and, presumably, suffered there the same deprivations and hardships as did the general population of the town. Apparently, British officers were quartered in his home and, consequently, Zubly in due order presented his bill this involuntary service to the crown. When it went unpaid, he threatened suit in a letter to the British quartermaster, but tempered it with an offer to arbitrate the matter:

I shall accordingly wait ten days & if in that time proper Bonds are not signed to submit [the claim] to two or three impartial persons to be chosen

“Many important disputes,” Mühlenberg noted, “are settled in this way in the English colonies.”<sup>140</sup>

This suggestion would seem to make my task easier if I were able to secure several other men to serve with me, for in this case, too, the saying may be true,

“Woe to him who is alone,” and especially between these two opposing parties.

Squire Tr[eutlen], who as a *justice* is well versed in the English laws,<sup>141</sup> promised

to draw up such documents and was of the opinion that he and the other

representatives of the majority party would agree to the plan, but whether the

opposite party will consent, no one knows.”<sup>142</sup>

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between us, whether or what Indemnification I ought to be allowed for the injury I think I sustained, I shall make use of the undoubted right of every subject to seek redress by Law, & do not wish to have any altercation by word or letter on the subject.

LILLA MILLS HAWES, Ed., Volume XXI, COLLECTIONS OF THE GEORGIA HISTORICAL SOCIETY, *The Journal of the Reverend John Joachim Zubly A. M., D. D., March 5, 1770 through June 22, 1781* (1989), at 111 (letter of J. J. Zubly to Captain Moon [should be Moore], dated August 10, 1780).

<sup>140</sup> *Id.*

<sup>141</sup> “Squire Treutlen” was “well versed in the English laws” indeed. Born Johann Adam Treutlein around 1733, the place of both his birth and his death are matters of some conjecture. What is certain is that this dominant figure in the Salzburger community went on to become a fervent Patriot at the time of the Revolution three years later and was elected the first governor of independent Georgia. See HELENE KASTINGER RILEY, JOHN ADAM TREUTLEN: THE EUROPEAN HERITAGE OF GEORGIA’S FIRST GOVERNOR (1999). Riley concludes that Treutlen was native to Kürnbach, now in modern Baden-Württemberg; he probably died at the hands of English partisans, most likely in South Carolina, sometime in 1778 or 1779, after the end of his one year service as independent Georgia’s first chief executive. See also AMANDA JOHNSON, GEORGIA AS COLONY AND STATE 136 (1938).

<sup>142</sup> HENRY MELCHIOR MÜHLENBERG, THE JOURNALS OF HENRY MELCHIOR MÜHLENBERG, Vol. II, 610 (Theodore G. Tappert & John W. Doberstein, *trans.*, 1942).

It does not appear from the extant records that Treutlen's proposal for a double arbitration—one complying with both the German Lutheran prescriptions as well as those of the English law—ever came to fruition: on the same evening after his conversation with John Treutlen, Pastor Triebner approached the Philadelphia divine and suggested that Treutlen was not to be taken at face value:

They earnestly warned me that I must be on my guard against the man [Treutlen] because he had once written a letter to Pastor B[oltzius, an early pastor at Ebenezer], whereupon the latter died soon after. My reply was: we must love our neighbor as ourselves and seek to win and improve everyone with love and gentleness, but never forget ourselves and rather seek to know ourselves thoroughly. ... They construed this honest man's proposal of an arbitration as a dangerous thing, as if it were the most perilous wile inspired by the evil spirit, and were ignorant of the fact that it had come this morning from the honest heart of a reverend doctor of theology [Zubly]. There was also a mistake in our *modus procedendi* according to the wisdom of the world. If I myself had presented a proposal and the squire and his consorts had opposed it, then Pastor Tr[iebner] and W[erstch], etc. would have insisted that an [additional English-style] arbitration and obligation were highly necessary.<sup>143</sup>

It would seem, then, that the proposal of a double arbitration came to naught for no reason other than it had been proposed by one of the parties, a fact which made it suspicious in the eyes of the other.

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<sup>143</sup> *Ibid*, at 611.

On November 11, the two disputing pastors met with Mühlenberg and, in a session which began in an unpromising manner, the two ministers seemed moved by the profound disappointment of Mühlenberg in the state of affairs at Ebenezer. It appeared, at least temporarily, that both of them were disposed to end their quarrel and heal the schism in the Georgia Lutheran community.<sup>144</sup> On the following Monday, November 14, 1774, Pastor Rabenhorst submitted his accountings for his administration of the properties of the community, including the records regarding his purchase of a plantation and saw mill for the community in 1754.<sup>145</sup> It had become clear to Mühlenberg that much of the dissension and discontent within the community had arisen regarding misinformation surrounding Rabenhorst's later purchase of certain church properties and his administration of other such holdings.<sup>146</sup>

On November 22, 1774, no informal resolution of the disputes within the congregation having in fact been achieved, Pastor Mühlenberg convened the first formal conference of the arbitration at Ebenezer which was attended by both Reverend Christian Rabenhorst and Reverend Christopher Triebner, joined by the

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<sup>144</sup> *Ibid*, at 612.

<sup>145</sup> *Ibid*, at 614.

<sup>146</sup> *Ibid*, at 615.

Trustees of the Ebenezer church.<sup>147</sup> Mühlenberg again took care to display his warrant and credentials from the German authorities and obtained from all in attendance their submission to these instructions. The bulk of this meeting was given over to an examination of the legal documentation respecting the property of the congregation and the administration of the income which it had produced.<sup>148</sup> Another meeting was scheduled for the following day, November 23,<sup>149</sup> and once again Pastor Mühlenberg was disappointed that the parties were unable to achieve an amicable resolution of their disputes and that, in fact, the party of Pastor Triebner was becoming increasingly inflexible and demanding in tone, even to the point of submitting new written complaints to be joined with those that had already been filed with the Philadelphia minister.<sup>150</sup> The balance of this meeting was spent largely in mutual recriminations. As a final gambit, Mühlenberg –who, despite all that had transpired since his arrival in Georgia, remained universally respected by each of the contending parties at Ebenezer– threatened to give up on

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<sup>147</sup> *Ibid*, at 626. In the interim, Mühlenberg had received a draft constitution for the Ebenezer community, penned apparently by John Treutlen. This fact is significant because such a constitution –if not the precise one proposed by Treutlen– was ultimately to be adopted as the foundation for a long-term resolution of the tensions plaguing the community in the fall of 1774. *Ibid*, at 623-624. The pastor’s reliance on John Treutlen in this important matter speaks to the growing respect and friendship between the two men, a bond which persevered until their respective deaths. *See* GEORGE FENWICK JONES, *THE GEORGIA DUTCH: FROM THE RHINE AND DANUBE TO THE SAVANNAH, 1733-1783*, 174 (1992).

<sup>148</sup> HENRY MELCHIOR MÜHLENBERG, *THE JOURNALS OF HENRY MELCHIOR MÜHLENBERG*, Vol. II, 626-630 (Theodore G. Tappert & John W. Doberstein, *trans.*, 1942).

<sup>149</sup> Strobel seems, perhaps correctly, to have conflated the two sessions, one on November 22 and the other on November 23, into a single session held on November 23, 1774. *See* P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 155 (Baltimore, 1855).

<sup>150</sup> HENRY MELCHIOR MÜHLENBERG, *THE JOURNALS OF HENRY MELCHIOR MÜHLENBERG*, Vol. II, 630 (Theodore G. Tappert & John W. Doberstein, *trans.*, 1942).

any hope of reconciling the parties and proposed that he leave Ebenezer and return to Philadelphia.<sup>151</sup> The Triebner group expressed its willingness that Mühlenberg remain and see the procedure through to an amicable conclusion and Mühlenberg agreed, subject to the conditions that the parties “bury all their former contentions and quarrels and sincerely forgive and pardon one another, since they had all been more or less at fault” and that “the Jerusalem Church should be left open to Mr. Triebner so that both parties might be able to come together again and both ministers perform their common ministerial duties in the congregation unhindered.”<sup>152</sup> If these conditions were met, Mühlenberg indicated, he would endeavor “with the help of the ministers, to draw up a plan for the improvement of the whole thing.”<sup>153</sup> Despite this conclusion to the meeting of November 23, which left Mühlenberg “between fear and hope,”<sup>154</sup> it quickly became apparent in the next few days that the dispute had not in fact been finally and fully resolved. Disabled by a recurring disability from which he had suffered even while in Charleston, Mühlenberg was unable to personally intervene further in the matter.

While still recuperating in between intervals of pastoral service, Mühlenberg took the opportunity to draw up a new constitution for the Ebenezer community which would, he believed, serve as an enduring foundation for the reconciliation for the divided community and would, in addition, assist in effecting a reunion in accord with the Instructions Mühlenberg had received from Germany at the beginning of his involvement in the resolution of the Ebenezer

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<sup>151</sup> *Ibid*, at 633.

<sup>152</sup> *Id.* Strobel summarizes Mühlenberg’s lengthy recommendations to the parties. *See* P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 156-158 (Baltimore, 1855).

<sup>153</sup> HENRY MELCHIOR MÜHLENBERG, *THE JOURNALS OF HENRY MELCHIOR MÜHLENBERG*, Vol. II, 633 (Theodore G. Tappert & John W. Doberstein, *trans.*, 1942).

<sup>154</sup> *Ibid*, at 634.



dispute.<sup>155</sup> The new constitution proposed by Mühlenberg represented, in net effect, a formal arbitral conclusion to the disputes which would give the community an opportunity to put old complaints behind it and to start afresh. Reverend Triebner, however, had prepared his own version of such a constitution and the two ministers thereupon engaged in a lengthy debate regarding the relative merits of the two documents. On December 27, Mühlenberg met with Johann Caspar Wertsch and presented him with a revised version of the proposed constitution for the congregation, seeking his advice and suggestions for the improvement of the document.<sup>156</sup> Further meetings followed and the discussions concerning the terms of a new congregational constitution continued on into January of 1775. Finally, on January 16, an agreed-upon constitution in hand, the congregation came together and, after some discussion prompted by questions from individual members of the congregation, they signed the document at Jerusalem Church.<sup>157</sup> The arbitration procedure had come to its formal end.<sup>158</sup>

Mühlenberg remained on in Georgia well into February, 1775, attempting to use his personal status and influence to further cement the relations between the groups within the congregation and, during this time, he took the opportunity to meet with the royal governor of

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<sup>155</sup> *Ibid*, at 640.

<sup>156</sup> *Ibid*, at 651.

<sup>157</sup> *Ibid*, at 665. Disaster threatened but was avoided when, on January 30, 1775, the two disaffected pastors met with Mühlenberg to approve copies of the new community constitution which had been approved at the congregational meeting of January 16. Pastor Triebner especially appeared contentious, but was called down by John Treutlen who curtly demanded to know whether the minister had appeared to approve the copy of the January 16 concord or to negotiate a new one altogether. *Ibid*, at 670.

<sup>158</sup> The community discipline formulated under the guidance of Mühlenberg is discussed at length in P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS 164-187* (Baltimore, 1855).

the colony, Sir James Wright.<sup>159</sup> At this meeting with Wright, Mühlenberg learned that the complication respecting the title to the land of Jerusalem Church and its status *vis a vis* the Church of England had been addressed and resolved by the governor.<sup>160</sup>

Taking advantage of his presence in Savannah, Mühlenberg arranged an introduction to a number of the leading luminaries of the colony including its Chief Justice, Anthony Stokes<sup>161</sup>, and its leading merchant, James Habersham.<sup>162</sup> On February 17, 1775, Mühlenberg and his wife, determined to finally leave Georgia and return to their Philadelphia home, embarked on a ship in Savannah harbor, but it was not until Sunday, February 19, 1775, that the vessel reached Tybee

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<sup>159</sup> This meeting took place on February 6, 1775, and was given over in the main to a consideration of the lingering title issue regarding the Jerusalem Church at Ebenezer. HENRY MELCHIOR MÜHLENBERG, *THE JOURNALS OF HENRY MELCHIOR MÜHLENBERG*, Vol. II, 678-679 (Theodore G. Tappert & John W. Doberstein, *trans.*, 1942). Mühlenberg had prepared a memorial on the question earlier that month on February 4, *ibid*, at 675, and had even gone to the length of preparing an extensive trust deed on the property for use in securing the lands and their dedication to the Lutheran congregation. *Ibid*, at 667. Meeting with Wright, however, it appeared that the royal government was in no mood to assert any claim to the property on behalf of the Anglican Church and that the governor had already consulted with the colonial attorney general on how to resolve the question in favor of the Ebenezer congregation. *Ibid*, at 679. *See also* GEORGE FENWICK JONES, *THE GEORGIA DUTCH: FROM THE RHINE AND DANUBE TO THE SAVANNAH, 1733-1783*, 174-175 (1992).

<sup>160</sup> Strobel rehearses the complication respecting the title to Jerusalem Church and, with some degree of pardonable hyperbole, attributes the resolution of the impasse to Mühlenberg's intervention with the royal authorities in Savannah. *See* P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS* 161-163 (Baltimore, 1855). Historical accuracy (as well as Mühlenberg's own statements in his diary) requires, however, that Governor Wright be accorded the lion's share of credit for the removal of the nettlesome cloud on the church's title. The initiative to do so appears to have been solely that of the royal governor.

<sup>161</sup> HENRY MELCHIOR MÜHLENBERG, *THE JOURNALS OF HENRY MELCHIOR MÜHLENBERG*, Vol. II, 679 (Theodore G. Tappert & John W. Doberstein, *trans.*, 1942).

<sup>162</sup> *Ibid*, at 681. This meeting occurred on February 10, 1775.

Roads.<sup>163</sup> On the following day the ship reached open waters, and in early March it arrived off the headlands of Cape Henlopen and the river entrance into Pennsylvania.<sup>164</sup>

With the return of Mühlenberg to his Philadelphia home, Georgia's most famous –if not most successful– arbitration of the eighteenth century came to a close:

The Salzburgers and their descendants should cherish the memory of Dr. Muhlenberg with lively gratitude. For ... he was not only instrumental in restoring harmony to the congregation: he saved the church property from being alienated, and by his presence and labors, and the introduction of a wholesome discipline, he prepared the way for the future peace and prosperity of the church. . . . [H]e did everything which human wisdom could devise and human agency could accomplish, to place the congregation at Ebenezer upon such a footing as would secure its permanent prosperity and success.<sup>165</sup>

### Section 3. Statutory Forms of Informal and Nonjudicialized Arbitration in Georgia

Only four short decades separated Georgia's birth in the 1730s and the outbreak of the American Revolution in the mid-1770s and yet, in that brief interlude, the natural inclinations of the people of the state stemming in the main from strong ethnic and religious identifications within subgroups in the population coupled with the generally positive experience with

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<sup>163</sup> *Ibid*, at 686.

<sup>164</sup> *Ibid*, at 687.

<sup>165</sup> P. A. STROBEL, *THE SALZBURGERS AND THEIR DESCENDANTS 186-187* (Baltimore, 1855).

arbitration in that forty year span virtually insured that Georgia, when she assumed the mantle of full sovereignty and statehood with competence to legislate for her own interests, would continue the emerging arbitral tradition of the state.

### *Legislative Provisions for the Arbitral Resolution of Civil Disputes*

Even before the end of the eighteenth century, the Georgia legislature recognized the utility of arbitration and particularly the usefulness of arbitration in the maintenance of public services, especially with respect to transportation and communication initiatives which were, in this phase of Georgia's development, particularly important. For instance, in 1799 the legislature appointed a slate of commissioners for the regulation of navigation pilots in Georgia's ports to ensure minimum standards of safety and competency in that critical function. As a means of ensuring that civil claims and disputes would not disrupt licensed pilots in their duties, the commissioners appointed by the legislature were vested with authority, "in case any damage, dispute, complaint or difference shall happen or arise or be made against or between any master or pilot for, of, or concerning the pilotage of any ship or vessel or any other matter incident or relative to the business or care of a pilot in any of [Georgia's] harbors," to resolve claims—at that time, not to exceed \$100—acting as arbitrators in the matter.<sup>166</sup>

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<sup>166</sup> 1799 Ga. Laws, Vol. I, 24. In 1832, the legislature amended the old 1799 statute respecting the license of navigation pilots and, in language which had no analog in the earlier legislation, required each pilot licensed under the legislation to provide security (presumably in the form of a bond) in the amount of \$2000 conditioned on the "due execution of their office, and for their abiding by the decrees, arbitrations and awards of the commissioners of pilotage, made in pursuance of the authority vested in them by [the 1799] law." 1832 Ga. Laws, Vol. I, 145.

The ability of the arbitral process to ensure uninterrupted provision of such public services, as foreshadowed by this legislation regarding navigation pilots, was quickly adapted to other forms of transportation as well. In 1821, in the legislative charter granted to the Washington Turnpike Company, the power of eminent domain granted to the corporation was joined with the statutory command that, “in case of disagreement [regarding the value of any land or property interest taken by the company], then the same shall be decided by two persons, (with power of umpirage) one of them shall be selected by each party; and the damage so ascertained shall be paid forthwith to the party [whose property was] injured.”<sup>167</sup> The same pattern was repeated the next year when the legislature granted a similar charter to the Turnpike Companies of Milledgeville, Greensboro and Eatonton.<sup>168</sup>

By this time, a clear pattern was emerging in Georgia legislation: when, in 1826, the legislature acted to grant a charter to the Brunswick Canal Company –one of the most famous transportation undertakings in the history of the State of Georgia, memorialized in some detail in the diary of Frances Kemble Butler<sup>169</sup>– the legislature once again resorted to arbitral processes to ensure the smooth and uninterrupted functioning of the new public utility. In this case, the

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<sup>167</sup> 1821 Ga. Laws, Vol. II, 64.

<sup>168</sup> 1822 Ga. Laws, Vol. I, 86.

<sup>169</sup> Fanny Kemble, prior to her marriage to Pierce Butler in 1834, had been the darling of two continents as a result of her successful stage career both in London and in the United States. Marrying into the wealth and privilege made possible by her husband’s extensive land and slave holdings in South Carolina and Georgia, her diary of the first year (1838-1839) spent on her husband’s rice and cotton plantations outside of Darien, Georgia, provide priceless insights into antebellum Georgia society. Her record abounds with references to the new Brunswick Canal which was a frequent topic of discussion among Georgia’s coastal elite in the last half of the 1830s. *See* FRANCES ANNE KEMBLE, *JOURNAL OF A RESIDENCE ON A GEORGIAN PLANTATION 1838-1839* (1863), reprinted in *PRINCIPLES AND PRIVILEGE: TWO WOMEN’S LIVES ON A GEORGIA PLANTATION* (Dana D. Nelson, ed., 1998).

corporation was authorized to select and purchase strips of land from the Altamaha to the Turtle River “as may be necessary for their canal or railway.” Were any disagreements to arise regarding these land seizures, the legislature determined that the company was to appoint three disinterested freeholders and the owner to appoint a like number, all subject to the approval of the Inferior Court of Glynn County, to act as an arbitral committee to evaluate and decide the disputed matter. Where these six were unable to resolve the dispute, they were empowered to choose an additional umpire to make the necessary decision.<sup>170</sup>

As the pace of both urbanization and industrialization increased in Georgia toward the middle of the nineteenth century, the General Assembly was more and more frequently invoked to grant corporate status to yet additional infrastructural enterprises and, almost invariably, the legislature resorted to arbitral devices as a means of resolving the inevitable disputes which arose in the wake of the operations of these new corporations. When the St. Mary’s and Columbus Rail Road Company received its charter in 1836,<sup>171</sup> the corporation –much along the lines of the Brunswick Canal Company before it– was authorized to condemn strips of land between the cities of St. Mary’s and Columbus, subject to the arbitral resolution of disputes which might arise in the course of these condemnations. Three years later, corporate condemnations of property along the Altamaha and Sapelo Rivers and their branches were made subject to arbitration by the new Bellville and Altamaha Canal, Railway and River Navigation

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<sup>170</sup> 1826 Ga. Laws, Vol. I, 53.

<sup>171</sup> 1836 Ga. Laws, Vol. I, 209. *See also* 1837 Ga. Laws, Vol. I, at 204, an act to incorporate the Milledgeville and Chattahoochee Canal and Rail Road Company, and especially 208, § 7, providing for arbitration of disputed appraisals of land taken by the company for railroad purposes.

Company.<sup>172</sup> In like fashion, when the legislature in 1849 incorporated in one act multiple turnpike companies (the Dahlonega and Marietta Turnpike and Plank Road Company; the Cumming and Atlanta Turnpike and Plank Road Company; the Cobb County and Alabama Plank and Turnpike Road Company; and the Washington Railroad or Plank Road Company), the legislature conditioned the companies' right to exercise powers of eminent domain subject to an arbitration requirement in terms almost modern:

The said corporation may use for the construction of said road the route of any public highway or public road on said route without obstructing in any manner the said public highway or road; and when the said Turnpike or Plank Road shall pass over the lands of any private individual and not along the track of such public highway, and if any damage shall be claimed by any such individual by reason of said road passing over his land or premises and the amount of damage cannot be agreed upon by such individual and the proper agent of the company, then the said agent may select one disinterested person and the owner of such premises another disinterested person to assess such damage, the said arbitrators first being duly sworn to decide the same equitably and justly between the parties, and if the said arbitrators should disagree as to the amount of damage, they may and are hereby required to select an umpire who is wholly disinterested and who shall be in like manner duly sworn, and whose decision shall be final and

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<sup>172</sup> 1839 Ga. Laws, Vol. I, 97.

conclusive between the parties, and the right-of-way so in dispute shall be vested in said corporation during the continuance of their charter.<sup>173</sup>

In 1855, the legislature authorized William and Robert Schley, both of Richmond County, the “right to open and construct a railroad, plank road, or other road from their sawmill in Spirit Creek in [Richmond] County to any point on the Augusta southwestern plank road between the 11 and 13 mile post on said plank road from this city of Augusta for the transportation of timber, lumber and wood.”<sup>174</sup> Damages caused by the opening and maintenance of this road, in accordance with the now-established tradition of the legislature, were to be submitted to arbitration. Each party was to have the right to “select one disinterested person to arbitrate the issue, and if the two said arbitrators so selected cannot agree, then they are to choose a third disinterested arbitrator as an umpire, and their award as to the amount of compensation or damages for the right-of-way, shall be final and conclusive between the parties . . .”<sup>175</sup>

With the advent in 1861 of armed conflict in Georgia and the Southern Confederacy, most infrastructural development of roads, turnpikes, railroads, and canals came to a halt<sup>176</sup>; with Reconstruction, however, the pace of such incorporations once again increased and, with it, additional instances of legislatively mandated arbitration. When in 1870 the Georgia Seaboard & Northwestern Railroad Company was formed, its right to exercise powers of condemnation

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<sup>173</sup> 1849 Ga. Laws, Vol. I, 219.

<sup>174</sup> 1855 Georgia Laws, Vol. I, 186.

<sup>175</sup> *Id.*

<sup>176</sup> Railroad construction had taken on stupendous dimensions in Georgia prior to the outbreak of war in 1861. *See* E. MERTON COULTER, *GEORGIA: A SHORT HISTORY* (1960), especially at 257-264.



—much in the fashion of the legislative privileges granted in such cases prior to the 1861 war—was subject to dispute arbitration by two disinterested freeholders residing in the county where the dispute arose. The statute further provided that if these were unable to agree on an amicable resolution of the dispute, a third arbitrator was to be chosen to act as an umpire to decide the dispute finally and fully. The registration of the arbitral award under this statute would dissolve any injunction issued against the railroad in the condemnation of the land in question.<sup>177</sup>

Within three years, the legislature employed similar language to require arbitration of disputes arising out of condemnations by the Valdosta and Fort Valley Railroad Company.<sup>178</sup> Similar provisions were made in 1882 at the time of the incorporation of the Irwinton Railroad Company<sup>179</sup> and the Fulton Street Railroad Company<sup>180</sup> in Atlanta. In 1886, substantially the same stipulations were inserted into the corporate charter of the Tallahassee, Bainbridge and Western Railway Company<sup>181</sup> and, in 1888, into the charter of the Thomasville and Suburban Railroad Company.<sup>182</sup> In the last general transportation company charter of the nineteenth century, the legislature subjected the right of the Collins Park and Belt Railroad Company to condemn privately held lands to a requirement of arbitral resolution of disputes, consistent with the pattern which had developed throughout that century.<sup>183</sup>

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<sup>177</sup> 1870 Ga. Laws, Vol. I, 323.

<sup>178</sup> 1873 Ga. Laws, Vol. I, 211.

<sup>179</sup> 1882 Ga. Laws, Vol. I, 217.

<sup>180</sup> 1882 Ga. Laws, Vol. I, 220. The charter of the Fulton Street Railroad was later amended by 1888 Ga. Laws, Vol. II, 678.

<sup>181</sup> 1886 Ga. Laws, Vol. I, 146.

<sup>182</sup> 1888 Ga. Laws, Vol. II, 679.

<sup>183</sup> 1888 Ga. Laws, Vol. II, 211.

The legislature's incorporation of yet other companies outside the transportation field registered the growing industrialization of the State of Georgia, particularly in the years after the midpoint of the nineteenth century.<sup>184</sup> The Etowah and Auraria Hydraulic Hose Mining Company and the Cedar Creek Lumber Drifting Association were both chartered in 1859 on the eve of war, the former being authorized to divert the waters of the Etowah River, Nimble Will Creek, and Jones Creek "from their natural channel, by dam or dams, ditch, or aqueduct of any kind, [in order] to work for gold or any other valuable mineral, according to the Hydraulic Hose Mining System." In conducting these operations, any damages inflicted upon or compensation otherwise due to the owners of both vacant and occupied lands were to be resolved in an arbitral process conducted under the auspices of the "three freeholders of the company, one chosen by said company, one by the claimant, and the third chosen by Inferior Court of [Lumpkin] County." The decision of this arbitral panel was final as to the issues presented to it, and –upon deposit of the amount of the award with the Clerk of the Lumpkin County Inferior Court– the mining company could proceed with its operations even over the objection of the property owner.<sup>185</sup> This pattern proved popular. The next year, the General Assembly incorporated the Courticay Hydraulic Hose Mining Company, including in its charter terms virtually identical to those of the Etowah and Auraria Hydraulic Hose Mining Company.<sup>186</sup> Identical stipulations were also included in the charter of the Mountain Town Hydraulic Hose Mining Company that same year.<sup>187</sup>

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<sup>184</sup> E. MERTON COULTER, *GEORGIA: A SHORT HISTORY* 349-359, 401-413 (1960).

<sup>185</sup> 1859 Ga. Laws, Vol. I, 252.

<sup>186</sup> 1860 Ga. Laws, Vol. I, 119.

<sup>187</sup> 1860 Ga. Laws, Vol. I, 126.

The exploitation of the North Georgia gold fields unquestionably continued throughout the period of the 1861-1865 war,<sup>188</sup> but no new corporations were formed for this purpose until Reconstruction when, in 1866, the Georgia Company was formed to resume the hunt for gold in the Georgia hills. This corporation was granted the right to “divert from their sources and channels, the waters of the streams of Clear Camp and Clay Creeks, in Lumpkin County, and Little Amicalola, in the County of Dawson;” damages to landowners and their compensation, where no agreement could be reached as to this matter, were to be determined by an arbitral process in which the owner would appoint an arbitrator, the Georgia Company to appoint another, and the Justices of the Inferior Court to select the third. In an unusual provision, this statute stipulated that upon a failure of this arbitral panel to reach a decision, then a majority of the Justices of the Inferior Court of the county where the land was located could, upon the application of the company, appoint new arbitrators who were to assess the damages involved and whose decision in this regard would be final.<sup>189</sup> Yet another gold mining company, the last formed in Georgia history insofar as the records of the legislature indicate, was granted a

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<sup>188</sup> Amanda Johnson was of the opinion that the gold extraction industry in North Georgia was on the decline prior to the war:

Georgia gold was beginning to become scarce just before the War between the States, and some alarm was felt, lest the Federal Government abolish the mint located at Dahlonega. The Legislature in 1841, therefore, in a resolution, held forth that half a million dollars had been coined there in a short space of four years and the amount annually coined was increasing; to remove the mint would mean a heavy loss to many. Yet in 1859, Congress thought seriously of withholding the appropriation for the mint, but was spared the trouble for the War between the States came and it was confiscated by the Confederates.

AMANDA JOHNSON, *GEORGIA AS COLONY AND STATE* 396 (1938) (footnotes omitted).

<sup>189</sup> 1866 Ga. Laws, Vol. I, 103.

corporate charter in 1868.<sup>190</sup> This corporation too was subject to arbitration of claims by landowners affected by its operations. So accepted had arbitration become as the preferred means of dispute resolution among such mining companies that the records of the appellate courts of Georgia reflect at least one such procedure even where it was not required under the mining company's charter.<sup>191</sup>

As entrepreneurs turned their attention from the exploitation of Georgia's yellow gold to the extraction of its black gold—the iron and coal deposits<sup>192</sup> which enriched the soil of the state's northwest quadrant—the legislature was prevailed upon to grant charters to these extractive industries as well. In 1874, the Bear Mountain Iron and Coal Company<sup>193</sup> and, in the same year, the Dade Coal Company were formed.<sup>194</sup> Both of these coal mining corporations were

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<sup>190</sup> 1868 Ga. Laws, Vol. I, 96. This company was the VanDyke Hydraulic Hose Mining Company which was to have its operations in Dawson County, south of Dahlonega.

<sup>191</sup> See M. H. VanDyke, *et al.* v. Charles A. Besser, 35 Ga. 173 (1866). The Supreme Court vacated a trial court's order enforcing an award, finding the record inadequate to support the order of the lower court.

<sup>192</sup> Legislative subsidies to support the embryonic iron and coal industry in Georgia were known prior to the 1861 war:

Our dependence on foreign realms for iron goods, taking out of the state approximately a million dollars annually, was much deplored, therefore in 1857 iron masters in Cass County were exempted from paying a tax on all pig iron produced by them; and the following year a senate resolution asked that the Governor and the superintendent of the State Road reduce freight rates on all Georgian-produced iron products.

AMANDA JOHNSON, *GEORGIA AS COLONY AND STATE* 395 (1938) (footnotes omitted).

<sup>193</sup> 1874 Ga. Laws, Vol. I, 257.

<sup>194</sup> 1874 Ga. Laws, Vol. I, 263.

subject to a requirement to arbitrate disputes with landowners where the property rights of the latter were impacted by the operations of the corporation.<sup>195</sup>

Other forms of economic boosterism drew the legislature's attention in the latter half of the nineteenth century, and in these instances too arbitration was called upon by the General Assembly to ease the course of economic expansion. A general law adopted in 1888, for instance, extended the privilege of constructing telegraph lines over all lands owned by the State of Georgia and also upon any right of way or structures of any railroads in the state, so long as "the post, arms, insulators, and other fixtures of such lines be so erected, placed and maintained as not to obstruct or interfere with the ordinary use of such railroads, or with the convenience of any landowners more than may be unavoidable." If any dispute regarding the diminution of a property right arose in this connection, then under the statute "the question of . . . compensation shall be referred to arbitrators, mutually chosen, whose award, or, in the case of disagreement,

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<sup>195</sup> The charter of the Bear Mountain Iron & Coal Company, for instance, made provision in its Section X that the company had the right to construct roads, tramways, and railways necessary for the shipment and delivery of ore and materials at its furnaces, mills and shops and that it could, where necessary, condemn private property for these purposes. In the event of a disagreement regarding the valuation of the property so taken, compensation was to be assessed by two arbitrators chosen by the parties, together with an umpire chosen by the party-appointed arbitrators. In the event that the landowner failed to appoint such an arbitrator, the Ordinary of the county where the road was to be located performed this function. *See* 1874 Ga. Laws, Vol. I, 257, at 259-260. The Dade Coal Company had been formed a year earlier in 1873 by a charter granted by the legislature in that year naming Joseph E. Brown as the company president. *See* 1873 Ga. Laws, Vol. I, 185. The following year that charter was amended to include language substantially similar to that featured in the charter of the Bear Mountain Iron & Coal Company, permitting the company to condemn lands necessary for connecting roads and railways, subject to the right of the landowner to arbitrate the valuation of the property so taken. *See* 1874 Ga. Laws, Vol. I, 263, at 264-265.

that of the umpire, shall be binding between the parties, the umpire to be selected by the two arbitrators appointed by the parties.”<sup>196</sup>

A unique piece of legislation from 1874 foreshadowed the development of the great tourist attractions which dot the Georgia landscape today: in that year, the legislature authorized the governor to detail penitentiary convicts to improve the roads from Forsyth in Monroe County to Indian Springs, in Butts County, so that the public would have greater ease of access to “the great medicinal and curative properties of the waters of the Indian Spring.”<sup>197</sup> The General Assembly foresaw that in the improvement of the roads to the recreation site private real property claims might arise and these, it determined, would be resolved by arbitrators appointed by the landowner and the directors of the Indian Springs facility. Unusually for the nineteenth century, this statute created an express right of appeal from the decision of the arbitral panel, in this case to the Superior Court of the county in which the land allegedly damaged was located.<sup>198</sup>

During the legislative session 1865-1866, the first to meet after the surrender of Confederate forces at Appomattox and Durham Station the previous spring, the legislature authorized the Chatham Academy, the Free School, and the Union Society –each of which was an eleemosynary or charitable society active in Georgia well before the outbreak of war in 1861– to sell off their interests in certain vacant lands located in Chatham County which had been deeded to them by a previous act of the legislature in 1829. Apparently forewarned that squatters occupied some of these theoretically vacant lands, the legislature provided for the arbitration of any claims or disputes centering on rights of these individuals: the public corporation was to

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<sup>196</sup> 1888 Ga. Laws, Vol. II, 141.

<sup>197</sup> 1874 Ga. Laws, Vol. I, 382.

<sup>198</sup> *Id.*

appoint one disinterested freeholder and the person in possession another; these, if they were unable to achieve an agreement, were to select a third freeholder who was to place a value on these lands and whose decision in the matter was to be final and conclusive on these issues.<sup>199</sup>

Nor was the General Assembly oblivious to the possibilities of arbitration in the resolution of disputes between a private individual and the sovereign state itself. The model for such an arbitral process had been established in 1819 when the House of Representatives, in a resolution adopted on December 18 that year, referred to arbitrators the claims of Dr. William Greene who had been appointed a surveyor by Governor Rabun.<sup>200</sup> Four decades later, “matters in difference” between Elzey B. Reynolds and the state-owned Western and Atlantic Rail Road were submitted to the arbitration and award of an auditor, George D. Phillips, and John W. Lewis, the Superintendent of the Western and Atlantic Rail Road.<sup>201</sup>

A more extended experiment in private claim resolution began on December 10, 1862, when Georgia entered into a contract with the firm of Divine, Jones & Lee “for the purchase of a half-interest in certain card-making machinery,” along with the contract right to the use and manufacture of this machinery on joint account. Within a short period of time, disagreements arose between the firm and the State of Georgia with the result that the former submitted a memorial to the General Assembly “alleging a violation of the spirit and the letter of the agreement and a consequent damage to [the private firm] and asking for a dissolution of the partnership.” This petition was received by the legislature but ignored and, after the close of the 1861 war, Governor Jenkins appointed P. M. Compton as an umpire to settle the respective

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<sup>199</sup> 1865 Ga. Laws, Vol. I, 265.

<sup>200</sup> 1819 Ga. Laws, Vol. I, 170.

<sup>201</sup> 1860 Ga. Laws, Vol. I, 60.

claims of the parties in the card-making machinery and to divide their relative property interests. Pursuant to this power, a sale of the inventory of the card-making equipment was set down for April 5, 1866, but Compton –arbitrarily, in the view of the firm– postponed the sale over the protest of the company. By a resolution of the General Assembly of August 26, 1872, the respective claims of the state and of Divine, Jones & Lee were referred to three arbitrators (all members of the Georgia Senate) who were instructed to make a decision and report it back to the legislature at the next session.<sup>202</sup> Although the record is scanty, it seems that the senatorial arbitration came to naught, for on March 3, 1874, the legislature adopted yet another resolution, this time sending the claim of Divine, Jones & Lee to William A. Walton of Richmond County who was instructed to decide the matter –provided that the firm would agree to his arbitration– and whose decision in that case was to be final and conclusive.<sup>203</sup> This second arbitration was apparently more successful than was the first: the next year, the legislature voted an act to compensate Walton “for his services rendered in the case of Divine, Jones & Lee against the State of Georgia.”<sup>204</sup>

The Divine, Jones & Lee arbitration, though it spanned several sessions of the legislature and was submitted to at least two separate arbitral bodies, complicated as it was, was near child’s play compared to what erupted in 1907. In that year, the State of Georgia through its attorney general John C. Hart filed an original bill in equity in the Supreme Court of the United States seeking both legal and equitable remedies against the Tennessee Copper Company and the Ducktown Sulfur, Copper, & Iron Company, Ltd., both of which were engaged in copper

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<sup>202</sup> 1872 Ga. Laws, Vol. I, 523.

<sup>203</sup> 1874 Ga. Laws, Vol. I, 10.

<sup>204</sup> 1875 Ga. Laws 316.



smelting enterprises just over the north Georgia state line, but well over the boundary with Tennessee. The formal intervention of the State of Georgia in this matter began several years earlier when, in 1903, a resolution was adopted by the Georgia General Assembly creating a “commission to report on damage done by smelting copper at Ducktown,” Tennessee.<sup>205</sup> “It has been represented,” the resolution ran, “that great and irreparable damage has been, and is being, done to the timber, fruits and agricultural interests in the counties of Murray, Gilmer Fannin, Union and Towns, in the northern part of the State, through and by the smoke and fumes produced by the smelting of copper ores at the copper mines in Ducktown and vicinity in Polk County, State of Tennessee.” Taking action to “suppress . . . this evil,” the General Assembly appointed a commission consisting of the commissioner of agriculture, the state chemist, the state geologist, and two private citizens from the affected area nominated by the governor to look into the facts of the matter and to report to the state’s chief executive as to the damage done, the risk of future damage, and suggestions to the governor to remedy the problem. The governor, in turn, was to take “such steps as shall be proper and necessary to correct this evil and to prevent future damage” following the receipt of this report.<sup>206</sup>

The inquest reported back that “great damage was being done the territory in Georgia contiguous to the Ducktown district [in Tennessee], said damage being caused by the smoke, sulfur fumes and noxious, poisonous vapors and gasses generated by the roast-heaps, pits, ovens and appliances of the Ducktown Copper Companies.”<sup>207</sup> The legislature took note of the fact that the governor had quickly instituted a suit in the Supreme Court of the United States “to abate the

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<sup>205</sup> 1903 Ga. Laws, Vol. I, 691.

<sup>206</sup> *Id.*

<sup>207</sup> 1905 Ga. Laws, Volume I, 1250.

nuisance and injury by restraining and enjoining such methods of roasting and reducing the copper ores.”<sup>208</sup> The reaction from the companies in Tennessee had been equally swift: according to a resolution of the Georgia General Assembly, they had agreed to abandon the injurious methods of treating ores and to adopt newer, cleaner methods which “it was hoped and believed would entirely remove the offensive gasses.”<sup>209</sup> The state thereupon dismissed its suit on assurances that the Tennessee companies had abandoned the smelting methods of which the suit had complained.<sup>210</sup>

Regrettably, according to the legislature’s resolution, the “new process . . . is reported . . . equally injurious to all manner of vegetation as the former method.”<sup>211</sup> As a consequence, another commission was appointed to investigate the matter further and the state attorney general was instructed once more “to take such legal steps as may be necessary to abate the nuisance.”<sup>212</sup>

The response of the Supreme Court to the reinstated bill in equity filed by Georgia after the 1905 resolution was, measured against the modern expectation of the Supreme Court of the United States, rather rapid. The case was argued before the court on February 25 and 26, 1907, and, on May 13 of that year, the court handed down a resounding decision supporting the position of the State of Georgia in the matter in virtually every respect. In an opinion by Oliver Wendell Holmes, the court noted that most of the traditional predicates for equitable relief were absent in the case in that Georgia owned “very little of the territory alleged to be affected, and

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> 1905 Ga. Laws, Vol. I, 1250-1251.

the damage to it [is] capable of estimate in money, possibly, at least, [in a small amount].”<sup>213</sup> The case, Holmes stressed, was by no means an ordinary suit in equity which the normal rules could, in the usual course of events, resolve.

This is a suit by a state for injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forest and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power.<sup>214</sup>

Ruling that Georgia was entitled to bring and maintain the equitable petition for an injunction despite the fact that it did not fully demonstrate the expected prerequisites for equitable relief,<sup>215</sup> Holmes noted that:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulfurous acid gas, that the forest on its mountains, be they better or worse, and whatever domestic

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<sup>213</sup> *State of Georgia v. Tennessee Copper Co.*, 27 S.Ct. 618, 619 (1907).

<sup>214</sup> *Id.*

<sup>215</sup> These have scarcely changed since their formulation in the English courts of Chancery in the eighteenth century. *See* EDWARD D. RE & JOSEPH R. RE, *CASES AND MATERIALS ON REMEDIES* 22-38 (5th ed., 2000), *passim*. In their more modern formulation, these predicates would include the danger of irreparable harm to the petitioner; a finding that the hardship which would be sustained in the absence of injunctive relief would outweigh any hardship which the respondent would suffer in the presence of such an order; a degree of likelihood of success on the merits of the petitioner’s claims; the absence of substantial public harm in granting the injunctive relief; and, of course, the absence of an adequate remedy at law. *See* *Hughes v. Cristofane*, 486 F. Supp. 541 (U.S. Dist. Ct. Md., 1980), reproduced in EDWARD D. RE & JOSEPH R. RE, *CASES AND MATERIALS ON REMEDIES* 254-256 (5th ed., 2000).

destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether, for the injuries which they might be suffering to their property, they should not be left to an action at law.<sup>216</sup>

Despite an argument by the Tennessee defendants that Georgia had been guilty of laches in bringing the action before the court, Holmes ordered the injunction to issue.<sup>217</sup>

Almost immediately, the Tennessee Copper smelters approached the Georgia officials for an amicable end to the dispute. As a consequence, the General Assembly on July 27, 1907, adopted a resolution which –noting that Georgia’s cause “has . . . been passed upon by the Supreme Court of the United States adjudging the State of Georgia in her sovereign right, was entitled to the injunction prayed for”– insisted that the interlocutory relief for Georgia granted by the Supreme Court of the United States be made final but that, “recognizing and fully realizing the vast interest involved to the copper companies and to the people dependent thereon,” Georgia would –so ran the resolution– “act in a spirit of wisdom, justice, and moderation.”<sup>218</sup> The

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<sup>216</sup> *Id.*

<sup>217</sup> *State of Georgia v. Tennessee Copper Co.*, 27 S. Ct. 618, 620 (1907). A concurring opinion was registered by Justice Harlan who took the position that, under normal principles of equity practice, Georgia would not be entitled to extraordinary relief in chancery but would be relegated to legal damages only. In his view, “Georgia is entitled to the relief sought, not because it is a state, but because it is a *party* which has established its right to such relief by proof.” The fact that Georgia enjoyed sovereign prerogatives, in Harlan’s view, would not alter the case or make it more compelling in Georgia’s favor. *Id.*

<sup>218</sup> 1907 Ga. Laws, Vol. I, 991. The wry humor which the use of these words demonstrates would not have been lost, of course, on the members of the Georgia

attorney general was instructed that he was to proceed before the Supreme Court for a finalization of the interlocutory equitable relief issued by Justice Holmes on May 13, 1907, but that he was to otherwise “proceed liberally in the matter, to the end that no unnecessary hardship should be imposed upon the copper companies, and that no unnecessary time shall be allowed them to complete the structures that they now are building to stop the fumes, to the damage and injury of the citizens of Georgia and to her public domain.”<sup>219</sup>

The cautious, wait-and-see attitude evidenced by the General Assembly’s resolution of July 27, 1907, paid off: by 1913, Georgia had worked out a *modus vivendi* with the Tennessee Copper Company to put the adjustment of their disagreement over the operation of the Ducktown and Copper Hill smelters on a long-term basis. Under their agreement, the company was to make an annual deposit of \$16,500 as a form of reparation for the damage to Georgia property interests and, in addition, until the final determination of the case then pending in the U.S. Supreme Court, the company would make an annual payment of \$8,500 “for the arbitration of all claims” arising out of the operation of the smelters.”<sup>220</sup> Under the contract approved by the

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legislature which adopted them: they are, as every Georgia schoolchild knows, the unofficial motto of the State. *See* LAWTON B. EVANS, A HISTORY OF GEORGIA FOR USE IN SCHOOLS (1898, 1908), quoted at <<http://www.cviog.uga.edu/Projects/gainfo/georgiamotto.htm>>, a web site maintained by the Carl Vinson Institute of Government of the University of Georgia.

<sup>219</sup> 1907 Ga. Laws, Vol. I, 991.

<sup>220</sup> 1913 Ga. Laws, Vol. I, 1293. Under the arrangement worked out with the copper companies, Georgia would withhold a request in the Supreme Court for a final decree so long as the payments referenced in the 1913 resolution were made by the company and so long as Georgia was satisfied with the progress of the company in cleaning up the smelter and meeting its other obligations, including those relating to the arbitration of private claims by Georgia citizens. The simultaneous resolution in the General Assembly (1913 Ga. Laws, Vol. I, 1295) set forth the terms of this agreement between John Slaton as governor of Georgia and the Tennessee Copper Company.

General Assembly's 1913 resolution, a board of arbitration was constituted, consisting of one arbitrator appointed by the copper company, and one appointed by the governor of Georgia; in addition the governor was to appoint a referee who was to, "when necessary," act as a standing umpire. Under this arbitration arrangement, the decision of the state arbitrator and the arbitrator for the company "in cases where they agree" would be final. Where they disagreed, however, the umpire would be called in for a final resolution. A total of \$16,500 was to be made available to the arbitral panel on an annual basis "for the payment of awards that may be made for damages caused by Sulfur Dioxide Gasses from the plant of the company."<sup>221</sup> So long as the company abided by the terms of the agreement, Georgia covenanted that it would not apply for injunctive or other relief against the Tennessee Copper Company in the case still pending before the Supreme Court.<sup>222</sup>

Continuing dissatisfaction on Georgia's part with the performance of the Tennessee Copper Company led to a renewed application for more definitive injunctive relief in the Supreme Court. The matter was argued on April 6 and 7, 1915, and just over a month later on May 10, 1915, the Supreme Court in a decision written by Justice McReynolds issued its interlocutory decree, but stipulating specific terms requiring the company to keep daily records showing its operations; to make available to an inspector appointed by the Supreme Court all of the books and records of the company, and to submit to inspections on a semiannual basis, all to be paid for by the company; and to comply with emission limitations set by the court.<sup>223</sup> Within a

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<sup>221</sup> 1913 Ga. Laws, Vol. I, 1295.

<sup>222</sup> *Id.*

<sup>223</sup> *State of Georgia v. Tennessee Copper Co.*, 35 S. Ct. 618, 631 (1915).

week of this decision, on June 1, 1915, an order of the Supreme Court embodying the terms set forth in Justice McReynolds decision was issued.<sup>224</sup>

Experience with the arbitral arrangements mandated by the 1913 contract between Georgia and the copper companies in Tennessee indicated the necessity for a number of modifications and, in 1916, under the authority of yet another resolution adopted by the General Assembly, that agreement was modified to provide that the state's arbitrator was to be a citizen of Fannin, Gilmer, or Union counties, the areas of Georgia most directly impacted by the smelting operations in Ducktown and Copper Hill.<sup>225</sup> In addition –and most probably at the insistence of the Tennessee Copper Company– the umpire who was to decide cases where the two arbitrators were unable to resolve the issue was *not* to be a citizen of Fannin, Gilmer, or Union counties. In addition, the 1916 modifications also provided that the two arbitrators and the umpire appointed under its terms were to hold their offices for the full term of the contracts and were no longer to be filled by interim appointments, a practice which had apparently led on previous occasions to some instability in the work of the arbitral panel.<sup>226</sup>

The parties were back before the court in 1916 as a result of several reports by the court-appointed inspector, Dr. John T. McGill of Vanderbilt University in Nashville, Tennessee. As a consequence of these reports, the court modified its standing order with respect to permissible emissions by the company; ordering the payment of expenses and compensation of the inspector; and assessing costs of the proceeding subject to certain limitations against both the Tennessee

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<sup>224</sup> *Ibid*, at 652.

<sup>225</sup> 1916 Ga. Laws , Vol. I, 1056.

<sup>226</sup> *Id*.

Copper Company and the Ducktown Sulfur, Copper, and Iron Company, Ltd. The Court retained the case on its docket until further order.<sup>227</sup>

It was mutually agreed between Georgia and the companies in 1918 that, “on account of the great need for both of said commodities by the government of the United States in the present national crisis produced by the [First World] War,<sup>228</sup> the continuing order of the Supreme Court should be modified in certain respects. These modifications, embodied in a 1918 resolution of the General Assembly, eased the burden of proof on claimants who could not identify which of the two Tennessee companies was the specific source of the emissions which had harmed it and otherwise coordinated the position of the Ducktown Sulfur, Copper and Iron Company, Ltd., with that of the Tennessee Copper Company. In the revised contract terms, the payment of awards where the source of the emission was indeterminate was to be shared by the two companies on a ratio of two-thirds for the Tennessee Copper Company and one-third by the smaller Ducktown Sulfur, Copper and Iron Company, Ltd.<sup>229</sup> In 1925, Georgia –recognizing that it was “more expedient and to the interest of [Georgia] citizens to give to these companies opportunity to remedy the evils complained of and to adjust such damages as may be done to its citizens of this state” through a system of arbitration– yet again renewed and extended the contracts between the state and the two Tennessee corporations for an additional term ending in 1930.<sup>230</sup>

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<sup>227</sup> State of Georgia v. Tennessee Copper Co., 36 S.Ct. 465 (1916).

<sup>228</sup> 1918 Ga. Laws, Vol. I, 938-939.

<sup>229</sup> 1918 Ga. Laws, Vol. I, 938.

<sup>230</sup> 1925 Ga. Laws, Vol. I, 1618.



After the renewal of the contract in 1925, Tennessee Copper Company acquired the assets of the Ducktown Sulfur, Copper and Iron Company, Ltd., and in 1937 sought and obtained certain other adjustments to the arbitral process determined by the prior agreements:

The Board of Arbitration herein referred to shall be composed as follows: the company shall appoint one arbitrator, whose compensation and expenses shall be paid by it, to be known as the company's arbitrator. The Governor of the State shall appoint one arbitrator, who shall be known as the State's arbitrator, unless the arbitrator appointed by the company shall be a citizen of one of the three counties of Fannin, Gilmer, or Union, then the State's arbitrator shall be a citizen of one of those counties and may be selected from one of those counties even though the company's arbitrator also resides therein. The State's arbitrator shall also be ex-officio an inspector . . . <sup>231</sup>

The modified contract dispensed with the necessity of a permanent umpire, shifting to a system where the two arbitrators would appoint an umpire in the event they were unable to agree as to any specific dispute. In addition –and apparently for the first time– the contract between the state and the Tennessee Copper Company made provision for the company arbitrator and state arbitrator to “make and formulate appropriate rules and regulations for the governing of the arbitration in accordance with [the] contract.”<sup>232</sup> Further, a separate procedure was stipulated in the 1937 contract revision for the appointment of an arbitral panel in the event of allegations regarding the lack of *bona fide* performance of the contract by the company. In that case, the

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<sup>231</sup> 1937 Ga. Laws, Vol. II, 1426, at 1430.

<sup>232</sup> *Ibid*, at 1431.

company was to appoint an arbitrator of its own selection, and another was to be appointed by the governor of Georgia who was to be the chemist of the state or such other person as the governor chose; these two were then to select some additional competent person as umpire and these three individuals were to constitute a board which, by majority vote, could determine any issues before it and whose decisions would be final and binding on all the parties:

It is the intention of the parties hereto to create and maintain a permanent arbitration system, and it is agreed that this contract shall continue in effect, unless terminated by the mutual agreement of the company and the Governor, after the Governor has been authorized and directed by the Legislature of the State to do so, or terminated by the permanent cessation of both of said plants of the company, it being understood and agreed, however, that the temporary suspension of operations at either or both of said plants shall not terminate the contract.<sup>233</sup>

The 1937 revisions concluded with the resolution that the case filed by Georgia in 1905 –and still pending before the Supreme Court in 1937– was to be “dismissed and stricken from the docket of that Court, and all orders and decrees heretofore entered in said cause vacated and the order in such appropriate form as may be approved by said Court shall recite that all costs in the cause which have been taxed against the State or said Tennessee Copper Company are to be paid by that company.<sup>234</sup> As a consequence, on January 10, 1938, the Supreme Court, on joint motion of the Tennessee Copper Company and the State of Georgia, dismissed the bill in equity,

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<sup>233</sup> *Ibid*, at 1433.

<sup>234</sup> *Ibid*, at 1433-34.

bringing to a close almost three decades of litigation. The case had been long and arduous, but it had demonstrated the effectiveness and utility of arbitration in the management and resolution of a long-term, ongoing, and politically sensitive dispute.<sup>235</sup>

### *The Role of Arbitration in Georgia's Tax Structure*

The use of arbitration as a helpful adjunct to the taxation process in Georgia has paralleled its use in the other fields of civil conflict outlined above. Georgia, not unlike other units of modern government, has over time developed an intricate, almost byzantine, system of statutory provisions to implement a policy of imposing taxes of an almost bewilderingly wide spectrum. Taxes on the *ad valorem* valuation of real property; county taxation; municipal taxation; school taxation; *ad valorem* taxation of motor vehicles and mobile homes; *ad valorem* taxation of public utilities; *ad valorem* taxation of airline companies; taxation of intangible personal property; taxation of real estate transfers; intangible recording taxes; taxation of

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<sup>235</sup> State of Georgia v. Tennessee Copper Co., 59 S. Ct. 98 (1938). The legislature apparently found the arbitral resolution of existing civil disputes to its liking, so much so that in at least one later instance it provided for arbitration to resolve private claims which had not yet arisen. In 1972, the Georgia General Assembly adopted comprehensive legislation to address the collection, preparation, and publication of the official reports of the Georgia Supreme Court and the Georgia Court of Appeals. In that connection, the legislation provided for the appointment of a publisher for the judicial opinions of Georgia's two appellate courts. The relation between this publisher, the Georgia Supreme Court, the Georgia Court of Appeals, and the official Reporters of both the Georgia Supreme Court and the Georgia Court of Appeals were spelled out in some detail in the legislative provisions, including the stipulation that in the event of the submission of an apparently erroneous statement by the publisher to the reporter, the attorney general of Georgia was to act as an arbiter between the reporter and the publisher. 1972 Ga. Laws, Vol. I, 460.

financial institutions; state income taxation; local income taxation; and state taxes on sales, use, and other transactions both at the state and local level are only a few of the tax mechanisms featured in the overall structure of Georgia law.<sup>236</sup> Given the rich variety of forms of Georgia taxation and the fact that most of these are, to a greater or lesser degree, fact-oriented in their assessment, imposition, and collection, it comes as no surprise that factual disputes are a common occurrence in the state's taxation process whether at the state-wide level, the county level, or locally. The Georgia legislature has adapted the arbitral process to the resolution of these disputes in a number of key respects.

The state's statutory scheme for the assessment of property and the imposition of *ad valorem* taxes at the county level, for instance, envisions the valuation of a taxpayer's property by professional staff, subsequent to which a County Board of Tax Assessors may meet to receive and inspect tax returns laid before it by the tax receiver or tax commissioner of the county. This board is charged to determine that all taxable property within the county is assessed and returned at its fair market value, and that fair market values as between and among the individual taxpayers are "fairly and justly equalized so that each taxpayer shall pay as nearly as possible only such taxpayer's proportionate share of taxes."<sup>237</sup> In the event, however, that a taxpayer is disgruntled with both the action of the appraiser and the County Board of Tax Assessors, it may

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<sup>236</sup> See 1978 Ga. Laws, Vol. I, 309. A quick review of the index to Title 48 (Revenue and Taxation) of the Official Code of Georgia confirms the wide expanse of Georgia taxes, encompassing within that Title provisions on *ad valorem* taxation of property, taxation of intangibles, income taxes, sales and use taxes, motor fuel and road taxes, motor vehicle license fees and plates, cigar and cigarette taxes, estate taxes, specific, business, and occupation taxes, and excise taxes on marijuana and controlled substances. See O.C.G.A. Title 48 (Table of Contents of Volume 36 and Volume 37), at 1.

<sup>237</sup> O.C.G.A. § 48-5-306(a).

be possible under certain circumstances to then seek a review of the valuation of the property concerned by a County Board of Equalization, a body separate and distinct from that of the County Board of Tax Assessors, which effectively acts as a review body over actions taken by the lower board. Georgia law provides further that “any resident or non-resident taxpayer may appeal from an assessment by the County Board of Tax Assessors to the County Board of Equalization or to an arbitrator or arbitrators as to matters of taxability, uniformity of assessment, and value and, for residents, as to denials of homestead exemptions.”<sup>238</sup> The arbitration system which the statute contemplates as a means for review of decisions taken by the County Board of Tax Assessors and the County Board of Equalization requires that a taxpayer so electing must provide a written notice of arbitration with the County Board of Tax Assessors, filed within forty-five days from the date of the mailing of the notice from which the appeal is taken. In the framework of this statutory arbitration, the disputed matter may be submitted to a single arbitrator if both parties (the taxpayer and the board) agree; if the parties are unable to concur in an arbitration using but one arbitrator, “then three arbitrators shall hear the appeal.”<sup>239</sup> Significantly, only registered real estate appraisers (or a higher classification as classified by the Georgia Real Estate Appraisers Board) may serve as an arbitrator in this connection. Further appeals from this arbitral tribunal to the Superior Court are provided for under the statutory terms.<sup>240</sup>

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<sup>238</sup> O.C.G.A. § 48-5-311(e).

<sup>239</sup> O.C.G.A. § 48-5-311(f)(3).

<sup>240</sup> O.C.G.A. § 48-5-311(g).

An analogous process at the state-wide level in Georgia is provided for the resolution of disputes concerning the correctness of the annual current equalized adjusted property tax digest of each county in the state and the current equalized adjusted property tax digest for the state as a whole. Under Georgia law, the state auditor is required to furnish to the State Board of Education the current equalized adjusted property tax digest of each county in the state and the current equalized adjusted property tax digest for the state as a whole and, in any county which has more than one school system, the state auditor is then to furnish the State Board of Education a breakdown of the current county equalized adjusted property tax digest showing the amount of the digest applicable to property located within each of the school systems located within the county.<sup>241</sup> Simultaneously, the state auditor is also required to furnish the governing authority of each county, the governing authority of each municipality having an independent school system, the local Board of Education of each school system, the Tax Commissioner or Tax Collector of each county, and the Board of Tax Assessors of each county the current equalized adjusted property tax digest of the local school system or systems, as the case may be, and the current equalized adjusted digest for the state as a whole. Under the provisions of this legislation, any party questioning the correctness of the digest is afforded the right to refer this issue to a Board of Arbitrators consisting of three members, one of whom is chosen by the State Auditor, one chosen by the complaining party and one chosen by these two.<sup>242</sup> In a somewhat unique provision, the law further provides that where the two arbitrators are unable to agree on a third member of the panel, the Chief Justice of the Supreme Court of Georgia shall appoint the third

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<sup>241</sup> O.C.G.A. § 48-5-274(e).

<sup>242</sup> O.C.G.A. § 48-5-274(f)(2)(A).

member at the request of either of the participating parties.<sup>243</sup> The arbitral panel so constructed is allowed fifteen days after the appointment of the full board to render a decision regarding the correctness of the digest in issue and, under the terms of the statute, the decision of this arbitration board is final.<sup>244</sup>

These technical and seemingly dry provisions of Georgia's tax code are but the modern descendants of statutory provisions reaching back more than a century into Georgia's legal past. As early as 1877, the state's General Assembly adopted a statute providing that issues as to property valuation in connection with corporate, individual, agency or institutional tax returns were to be referred to arbitrators for decision, a reflection perhaps of the desire to remove this important issue from final determination by local officers appointed in Georgia under Reconstruction governments. Under this statutory prototype, each complaining taxpayer was afforded the right to appoint one arbitrator and the Comptroller General of Georgia—a constitutional office no longer in existence—the other; these two were vested with a power to choose an umpire in the case of their disagreement and, in any event, the decision of the arbitrators was to be final.<sup>245</sup>

The method of arbitrator appointment under this early statutory system was modified a year later by legislation adopted in the General Assembly providing that where the arbitrators appointed under the system envisioned by the 1877 statute were unable to select an umpire within thirty days after their appointment, then the governor would have the power to appoint

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<sup>243</sup> O.C.G.A. § 48-5-274(f)(2)(B). Research has revealed no instance where this statutory option has been invoked.

<sup>244</sup> O.C.G.A. 48-5-274(f)(2)(A)-(C).

<sup>245</sup> 1877 Ga. Laws, Vol. I, 126.

two arbitrators who would, with the arbitrator selected by the taxpayer, form the arbitral panel to decide the question of amount or value.<sup>246</sup>

This statutory arbitration system appeared to work well and it was next modified only in 1905 when an amendment to the 1877 and 1878 legislation stipulated that only citizens of Georgia were to serve as arbitrators or umpires in the statutory scheme.<sup>247</sup> Legislation adopted in 1907 further prescribed the terms of the oath to be taken by the arbitrators or umpires in the system and also vested in them the power to compel the production of testimony and the right to issue *subpoenae duces tecum* to order parties to produce books and papers, and to summon witnesses.<sup>248</sup>

In 1910, the legislature saw fit to devise a general method for assessing and collecting taxes where authorized and, in the event no adequate provision otherwise existed in the law, for giving the taxpayer notice and an opportunity to be heard as to the valuation and taxability of the property subject thereto. In this general scheme, a disgruntled taxpayer could refer the question of true value of property subject to *ad valorem* taxation to a panel of arbitrators in which the taxpayer could choose one arbitrator, the other being chosen by the Comptroller-General of Georgia, these two being authorized to choose an umpire in the event of their disagreement.<sup>249</sup> In

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<sup>246</sup> 1878 Ga. Laws, Vol. I, 166.

<sup>247</sup> 1905 Ga. Laws, Vol. I, 68.

<sup>248</sup> 1907 Ga. Laws, Vol. I, 96. These provisions related only to tax returns made to the Comptroller-General of Georgia. In 1909, the legislature adopted an analogous provision for taxes at the county level providing that a dissatisfied taxpayer who returned his property below the valuation made under the auspices of the county grand jury could have this matter resolved by an arbitral process in which the property owner appointed one arbitrator and the Ordinary of the County (or the Chairman of the County Commissioners) would appoint the other two. *See* 1909 Ga. Laws, Vol. I, 81.

<sup>249</sup> 1910 Ga. Laws, Vol. I, 22.



the same year, the General Assembly adopted legislation governing the assessment and collection of past due taxes, again providing that the taxpayer could raise issues as to the valuation of property before an arbitral tribunal consisting of an arbitrator chosen by the taxpayer and another by the assessing officer of the municipality of the taxing municipality, with power in these two to select an umpire in the case of their disagreement.<sup>250</sup> In 1913, the legislature once again relied on the arbitral process as a device to resolve disputes as to the evaluation of property when it created a general system of tax equalization for Georgia.<sup>251</sup> Assessment arbitration was also the method of preference for the resolution of valuation disputes in a 1924 statute governing the taxation of railroad equipment companies.<sup>252</sup>

A Revenue Department of the State of Georgia was created by legislation in 1943 and, once more, it was provided that determinations by the new State Revenue Commissioner that particular property had been improperly assessed for *ad valorem* taxation purposes could be, on dispute, determined by an arbitral panel consisting of one arbitrator chosen by the taxpayer and one by the governor, with a power in these two to choose an umpire. Failing a resolution of the issue by this means, the Chief Justice of the Supreme Court of Georgia had the power of appointment with respect to the third member of the panel.<sup>253</sup>

With increasing urbanization of formerly rural areas in Georgia, the need for joint City-County Boards of Tax Assessors in the more populated counties of Georgia became apparent. In 1953, legislation adopted by the General Assembly provided for the establishment of such joint

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<sup>250</sup> *Ibid*, at 27.

<sup>251</sup> 1913 Ga. Laws, Vol. I, 123.

<sup>252</sup> 1924 Ga. Laws, Vol. I, 27.

<sup>253</sup> 1943 Ga. Laws, Vol. I, 204.

boards in all counties of Georgia having within their borders a population of 300,000 persons or more. Consistent with a tradition long established in Georgia by that point in time, provision was made that “any taxpayer dissatisfied with the action of joint City-County Board of Tax Assessors may demand arbitration” as provided in prior law.<sup>254</sup> The special considerations and concerns touching on *ad valorem* taxation on motor vehicles owned by dealers was addressed by statute in 1967 when the Georgia General Assembly passed an act providing for the classification of motor vehicles as a separate and distinct class of tangible property for *ad valorem* tax purposes and permitting arbitration of any disputes as to such tax valuations.<sup>255</sup>

Arbitration of disputes arising from valuations assessed by equalized adjusted school property tax digests was permitted by legislation adopted in 1970.<sup>256</sup> When these provisions relative to the equalized adjusted school property tax digests were amended in 1989 to change the method of their preparation, the general arbitration option for a disgruntled party was preserved, ensuring that arbitration will continue to have a significant role in the resolution of civil disputes arising from Georgia’s tax processes in the twenty-first century.<sup>257</sup>

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<sup>254</sup> 1953 Ga. Laws, Vol. I, 2792.

<sup>255</sup> 1967 Ga. Laws, Vol. I, 91.

<sup>256</sup> 1970 Ga. Laws, Vol. I, 542. This provision was amended by 1972 Ga. Laws, Vol. I, 829, stipulating that the aggrieved taxpayer could demand arbitration only by a written request.

<sup>257</sup> 1989 Ga. Laws, Vol. I, 597.

*Arbitration Within Georgia's Municipal Corporations: From the Early Nineteenth to the Mid-Twentieth Centuries*

The end of war in 1865 unleashed forces in Georgia which were, over the coming decades, to impose tasks on the state's urban governments, the likes of which could hardly have been conceived in the halcyon days before the outbreak of armed conflict in 1861. A great deal of the legislation pertaining to Georgia's towns and cities in the antebellum period was haphazard, spotty in nature, and lacking in any overall, comprehensive plan or structure. Perhaps the closest that Georgia had come to a comprehensive urban government charter was the compilation in the 1863 Code of the statutes which had been passed up until that time for the governance of Savannah, a compilation which served to some degree as a model for legislative charters in the years following the war.<sup>258</sup>

To be sure, the Georgia statute books were dotted with discrete and scattered pieces of legislation pertaining to Georgia's burgeoning urban centers and some of these, from time to time, included authority for the city to utilize arbitral processes in the resolution of disputes which might arise in the course of city government functions. For instance, an 1836 statute amending the charter of Milledgeville authorized the mayor and aldermen of the city to open lanes and alleys through the town's squares, including the right to take private property for this purpose if necessary. When disputes arose as to the valuation of property so taken, "the question," the amended charter provided, "shall be referred to the arbitrament of four

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<sup>258</sup> See Erwin C. Surrency, "Calculated to Promote the General Good": *The Development of Local Government in Georgia Towns and Cities*," Volume LXXIV *GEORGIA HISTORICAL QUARTERLY* 381, 408 (2000), citing 1874 Ga. Laws, Vol. I, 116. See also, Erwin C. Surrency, *The Georgia Code of 1863 and Its Place in the Codification Movement*, 11 *J. SOUTHERN LEG. HIST.* 81, 95-96 (2003).

disinterested and impartial persons,” two of whom chosen by the property owner and two by the Milledgeville board of aldermen. These four in turn were authorized to call in an umpire in the event they could not reach a majority decision as to the valuation, and a majority of the panel of five so constituted could render a decision which would be binding and obligatory on both the city and the aggrieved landowner.<sup>259</sup> Similarly, any disputes as to the use of the municipal bridge across the Savannah River at Augusta was, under an 1841 statute, to be determined by a board of “competent civil engineers or mechanics” nominated by the City and by persons seeking the use of the bridge who had been denied that privilege for engineering reasons by the city council of Augusta. The private party- and city-appointed engineers, if they could not reach a decision as to the feasibility of the proposed use of the bridge, were authorized to call in a third arbitrator to act as umpire and any decision thereafter reached was to be conclusive on the issue.<sup>260</sup> The legislature again in 1870, drawing largely on the pattern which it had employed in the earlier 1836 law regarding disputes over the condemnation of land for Milledgeville’s squares, made a provision in an amendment to the charter of Blackshear providing for arbitral resolution of any valuation disputes when the city took lands to open new streets and roads:

[The intendant] and commissioners [of Blackshear] shall have power to have all the roads, streets, lanes and sidewalks open and kept in good order to lay out and form new roads, streets and lanes in said town, whenever, in their judgment, it is necessary to do so: *Provided*, That before any new road, street or lane shall be open, the owners of the land, if known, or their agents, if they reside in the

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<sup>259</sup> 1836 Ga. Laws, Vol. I, 90.

<sup>260</sup> 1841 Ga. Laws, Vol. I, 45.

county, shall have written notice to appear before Council at a regular meeting, and choose a man on his, her, or their part, and the Council shall choose a man on their part, and the two thus selected shall choose a third who shall assess the amount of damages such owner or owners sustained by running such road, street or lane through their land. If the owners of such lands fail to choose a man on his, her, or their part, then the intendant and commissioners shall choose both the umpires, and they, a third, who shall proceed to assess the aforesaid damages.<sup>261</sup>

The increasing demands on urban governments in Georgia occasioned by the great social shifts during and after Reconstruction were soon to be reflected in municipal charters, whether by original grant or amendment to existing legislation, which vastly increased the range of activities and the extent of powers possessed by the state's cities.

The new era in powers granted to cities chartered by the General Assembly is reflected in the new charter Atlanta received in 1874. This statute restated many of the powers previously granted the city but also many more. The local government was authorized to establish a water works and given the power of eminent domain for this purpose, as well as for laying out streets. A city court was created with far greater jurisdiction than the typical mayor's courts.

Additionally, the city could appoint a building inspector who would check the inside of the building rather than being limited to whether the building was a nuisance. Moreover, the duties of many officials were clarified. Therefore, charters granted to new towns after 1874 began to resemble in many aspects the

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<sup>261</sup> 1870 Ga. Laws, Vol. I, 164.

one granted Atlanta. Unlike other regions of the country, Georgia was rather late in granting such a broad range of powers to their municipal corporations. But when this change came, a new era for Georgia cities had begun.<sup>262</sup>

This new generation of Georgia municipal charters frequently stipulated the arbitration of disputes arising in the course of the exercise of municipal powers. Atlanta's 1874 charter, for instance, in its terms relative to the functions of the Board of Water Commissioners, made explicit provision for the arbitration of any disputes between the water board and the owners of property taken by the board for the construction of Atlanta's new municipal water works:

The Judge of the Superior Court of Fulton County, upon application of either party . . . [shall] appoint three disinterested persons to examine said property, and to assess the value thereof, or the damages done to the same who shall, with as little delay as possible, discharge said duty, after having taken an oath, before some officer authorized to administer the same, to do the same impartially, to the best of their ability, and to make a return of their acting and doings in the premises to the next term of the Superior Court of Fulton County, to be entered on the minutes of said Court, and made the judgment thereof . . .<sup>263</sup>

Additionally, in language drawn almost directly from the 1836 statute pertaining to Milledgeville and the enlargement of its squares, the 1874 law permitted the mayor and council

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<sup>262</sup> Erwin C. Surrency, "Calculated to Promote the General Good": *The Development of Local Government in Georgia Towns and Cities*," Volume LXXIV GEORGIA HISTORICAL QUARTERLY 381, 408 (2000), citing 1874 Ga. Laws, Vol. I, 116.

<sup>263</sup> 1874 Ga. Laws, Vol. I, 116.

of Atlanta to “have full power and authority to open, lay out, to widen, straighten, or otherwise change, streets, alleys, and squares, in the said City of Atlanta.”

Whenever the said Mayor and General Council shall exercise the power above delegated, they shall appoint two freeholders, and the owners of said lots fronting on side streets or alleys shall, on five days notice, appoint two freeholders who shall proceed to assess the damages sustained, or the advantages derived, by the owner or owners of said lots, in consequence of the opening, widening, straightening, or otherwise changing, said streets and alleys, and in case said assessors cannot agree, they shall select a fifth freeholder; the said assessors to take an oath they will faithfully discharge their duties, and either party to have the right to enter an appeal, to the Superior Court of Fulton County . . .<sup>264</sup>

Throughout the last quarter of the nineteenth century, arbitral provisions appearing in municipal charters grew increasingly frequent and these were, more often than not, modeled on the provisions on the 1874 Atlanta charter and its legislative antecedents. The 1882 charter of Chauncey granted the city council and mayor there the right to condemn lands for the improvement of public streets and alleys, subject to arbitration rights in aggrieved owners quite similar to those provided for in Atlanta’s earlier charter.<sup>265</sup> Similarly, an amendment to the charter of Washington in 1884 provided for the arbitration of any disputes arising out of attempts by the city to widen or straighten its streets and sidewalks.<sup>266</sup>

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<sup>264</sup> See especially § 60, 1874 Ga. Laws, Vol. I, 116.

<sup>265</sup> 1882 Ga. Laws, Vol. I, 326.

<sup>266</sup> 1884 Ga. Laws, Vol. I, 393.

An unusual provision for the application of the arbitral process was made in an 1884 amendment to the road law of Chattooga County providing for the arbitration of disputes between road contractors and the county's road supervisor where disagreements had arisen in connection with road building projects undertaken by the county:

. . . all differences arising between the contractors and the supervisor in reference to compliances with contracts made between said supervisor and said contractor shall be submitted to an arbitration as follows: The contractor to select an arbitrator and the supervisor another, in the district where said road lies, and if these two cannot agree, then said arbitrators shall select an umpire, whose decision shall be final, and the Ordinary shall accept it as such; *Provided, however,* that no contractor or road defaulter shall be competent as an arbitrator or umpire in such cases.<sup>267</sup>

In 1886, Social Circle received an amended charter providing for arbitration of property damage claims occasioned by road improvements much in the fashion of the 1874 Atlanta law;<sup>268</sup> in like manner, a special act imposed a similar arbitral regime on the City of Athens, this too in connection with road improvement and widening projects.<sup>269</sup>

If the 1874 Atlanta charter was influential in establishing on a state-wide basis the concept of arbitration in connection with the municipal condemnation of lands, the 1888

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<sup>267</sup> *Ibid*, at 565.

<sup>268</sup> 1886 Ga. Laws, Vol. I, 250.

<sup>269</sup> 1886 Ga. Laws, Vol. II, 583.



amended charter of Jesup was equally influential in extending the arbitral process into municipal *ad valorem* taxation property value assessment disputes:

. . . if any assessment of any estate authorized by this Act shall be deemed erroneous, the owner or agent of any such real estate who may be dissatisfied with such assessment shall have the privilege of making complaint to the said Mayor and Alderman of said town within 20 days after the date of the report of the Assessors, which complaint must be made in writing; and upon such complaint being made, the assessment complained of shall be immediately referred to three arbiters, one chosen by the Mayor and Alderman of said town, one by the party complaining, and the third by the two so chosen, whose award in the matter shall be made within ten days, and shall be conclusive and final.<sup>270</sup>

An amendment to the charter of Carrollton in 1888 provided for the arbitration of disputes as to the valuation of property for *ad valorem* taxation purposes<sup>271</sup> and a further amendment to Brunswick's charter in 1888 brought that city in line with the growing statewide practice of arbitration of both valuation issues in tax proceedings and in land condemnations for

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<sup>270</sup> 1888 Ga. Laws, Vol. I, 245. This statute also perpetuated the established procedure of imposing arbitration on the resolution of disputes occasioned by city condemnation of lands for the widening or extending of streets and alleys. This statute typically provided for the appointment of arbitrators by the city through the mayor and aldermen and by the agreed property owner, those to appoint an additional arbitrator. Unusually, however, the charter amendment also stipulated that the property in question would not be taken for public purposes until the damages as assessed by the arbitrators had first been paid by the authorities of the town. *See ibid*, especially § 32, at 245. Later charter provisions regarding arbitration in condemnation proceedings were to make a contrary disposition.

<sup>271</sup> 1888 Ga. Laws, Volume I, p. 264. Curiously, an almost contemporaneous new charter for Statesboro omitted any provision relative to arbitration of valuation issues in connection with *ad valorem* taxation. *See* 1888 Ga. Laws, Vol. II, 797.

city street improvements.<sup>272</sup> Atlanta's 1874 charter which had seemingly opened a Pandora's box of arbitral processes in Georgia's urban governments was itself amended in 1890 to place strict time and procedural constraints on the assessor appointment process, but otherwise its fundamental arbitral features remained intact.<sup>273</sup>

Before the end of the nineteenth century, the basic Atlanta model for arbitration of disputes centering on land condemnations had been extended to the City of LaGrange,<sup>274</sup> the town of Rhine,<sup>275</sup> the City of Austell,<sup>276</sup> the City of Covington,<sup>277</sup> and the town of Davisboro.<sup>278</sup>

The twentieth century opened with the first municipal charter arbitration provision granted by the legislature appearing in that adopted for Thomson, providing for arbitration of land condemnation issues arising in connection with street improvements in the city.<sup>279</sup> The following year, both Sandersville and Harrison were granted charter provisions requiring the arbitration of disputes centering on the valuation of property for *ad valorem* tax purposes<sup>280</sup> and in that same year Chester was granted a charter requiring the arbitration of disputes as to the

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<sup>272</sup> 1888 Ga. Laws, Vol. II, 1010, especially § 21, *Land Condemnation Arbitration*; and §14, *Property Valuation for Ad Valorem Tax*.

<sup>273</sup> 1890 Ga. Laws, Vol. II, 446.

<sup>274</sup> 1890 Ga. Laws, Vol. II, 546.

<sup>275</sup> *Ibid*, at 727.

<sup>276</sup> *Ibid*, at 775.

<sup>277</sup> 1890 Ga. Laws, Vol. I, 195.

<sup>278</sup> 1896 Ga. Laws, Vol. I, 146.

<sup>279</sup> 1900 Ga. Laws, Vol. I, 455.

<sup>280</sup> 1902 Ga. Laws, Vol. I, 444 (Harrison); *Ibid*, at 578 (Sandersville). Harrison's charter was amended yet again in 1907 (1907 Ga. Laws, Vol. I, 700), but the requirement for the arbitration of tax evaluation disputes was retained in the new statute. *Ibid*, at 711.

valuation of land arising in connection with street improvements by the city.<sup>281</sup> A tax assessment dispute arbitration provision was included in the new charter of Davisboro in 1903<sup>282</sup> and the next year similar terms were included in the new charter of Greensboro,<sup>283</sup> a provision substantially copied in the charter granted Riddleville that same year.<sup>284</sup> Canton's charter was amended in 1905 to require the arbitration of disputes regarding valuation of property for *ad valorem* tax purposes,<sup>285</sup> and Harlem that same year had its charter amended to provide for arbitration of disputes arising from city land condemnations arising out of street improvements.<sup>286</sup> When the town of Yonker in Dade County was incorporated in 1906, its initial charter required the arbitration of disputes regarding damages consequent upon the city's widening and straightening city streets and alleys.<sup>287</sup>

A veritable explosion of charter rights requiring arbitration of civil disputes within the structure of Georgia's municipal corporations appeared on the statute books in the years immediately prior to the entry of the United States into the First World War: Georgia urban centers receiving such charter provisions included Pineview,<sup>288</sup> Leon,<sup>289</sup> Commerce,<sup>290</sup>

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<sup>281</sup> 1902 Ga. Laws, Vol I, 363.

<sup>282</sup> 1903 Ga. Laws, Vol. I, 491.

<sup>283</sup> 1904 Ga. Laws, Vol. I, 461.

<sup>284</sup> *Ibid*, at 578.

<sup>285</sup> 1905 Ga. Laws, Vol. I, 706.

<sup>286</sup> 1906 Ga. Laws, Vol. I, 797.

<sup>287</sup> *Ibid*, at 1126.

<sup>288</sup> 1907 Ga. Laws, Vol I, 880.

<sup>289</sup> 1908 Ga. Laws, Vol. I, 841.

<sup>290</sup> Georgia Laws 1909, Vol. I, p. 655.

Grovetown,<sup>291</sup> Mitchell's District,<sup>292</sup> Roberta,<sup>293</sup> Claxton,<sup>294</sup> Cordele,<sup>295</sup> Covington,<sup>296</sup> DuPont,<sup>297</sup> Pavo,<sup>298</sup> Swainsboro,<sup>299</sup> Cotton,<sup>300</sup> Marietta,<sup>301</sup> Blackshear,<sup>302</sup> Cobb,<sup>303</sup> Oxford,<sup>304</sup> Tifton,<sup>305</sup> Vienna,<sup>306</sup> Davisboro,<sup>307</sup> Milan,<sup>308</sup> and by an amendment, the City of Covington.<sup>309</sup> In the year following the end of the First World War, but a single charter was granted by the legislature –that to Sandersville– mandating the arbitration of an intra-municipal issue (the valuation of property for *ad valorem* taxation purposes),<sup>310</sup> but in 1920 – the following year– a record number of such provisions were inserted in municipal charters by the legislature in a single session. In

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<sup>291</sup> *Ibid*, at 936.

<sup>292</sup> *Ibid*, at 1183.

<sup>293</sup> 1910 Ga. Laws, Vol. I, 1062.

<sup>294</sup> 1911 Ga. Laws, Vol. I, 942.

<sup>295</sup> *Ibid*, at 990.

<sup>296</sup> *Ibid*, at 1043.

<sup>297</sup> *Ibid*, at 1116.

<sup>298</sup> *Ibid*, at 1503.

<sup>299</sup> *Ibid*, at 1572.

<sup>300</sup> 1913 Ga. Laws, Vol. I, 757.

<sup>301</sup> *Ibid*, at 987.

<sup>302</sup> 1914 Ga. Laws, Vol. I, 453.

<sup>303</sup> *Ibid*, at 617.

<sup>304</sup> *Ibid*, at 1108.

<sup>305</sup> 1915 Ga. Laws, Vol. I, 854.

<sup>306</sup> *Ibid*, at 899.

<sup>307</sup> 1916 Ga. Laws, Vol. I, 659.

<sup>308</sup> *Ibid*, at 796.

<sup>309</sup> 1918 Ga. Laws, Vol. I, 630.

<sup>310</sup> 1919 Ga. Laws, Vol. III, 1244.

that year, Cussetta,<sup>311</sup> Linwood,<sup>312</sup> Marietta,<sup>313</sup> Powder Springs,<sup>314</sup> Thomasville,<sup>315</sup> and Tifton,<sup>316</sup> received such charter mandates. Before the end of the 1930s, an additional thirteen charter provisions requiring the arbitration of disputes consequent upon municipal operations were mandated by the Georgia legislature.<sup>317</sup>

Whether because the legislature lost interest in the issue or, as is more probable, fewer opportunities for the original grant or the amendment of municipal charters arose, the pace of the adoption of charter revisions requiring arbitration in Georgia municipalities slackened dramatically from 1930 until the outbreak of the Second World War. In that period, only four municipal charters were granted (or amended) which required the arbitration of either valuation issues arising from *ad valorem* taxation or compensation owing to landowners in connection with condemnations: those of Folkston<sup>318</sup> Hawkinsville,<sup>319</sup> Brunswick,<sup>320</sup> and Hogansville.<sup>321</sup>

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<sup>311</sup> 1920 Ga. Laws, Vol. I, p. 884.

<sup>312</sup> *Ibid*, at 1101.

<sup>313</sup> *Ibid*, at 1191.

<sup>314</sup> *Ibid*, at 1437.

<sup>315</sup> *Ibid*, at 1583.

<sup>316</sup> *Ibid*, at 1625.

<sup>317</sup> Manchester, 1921 Ga. Laws, Vol. I, 1005; Jesup, 1922 Ga. Laws, Vol. I, 879; Cordele, *ibid*, at 680; Covington, *ibid*, at 720; Locust Grove, *ibid*, at 885; Vidalia, *ibid*, at 1004; Wrightsville, 1923 Ga. Laws, Vol. I, 840; Hogansville, 1924 Ga. Laws, Vol. I, 608; Toccoa, *ibid*, at 725; Valdosta, *ibid*, at 769; Kingsland, 1927 Ga. Laws, Vol. I, 1241; Pinehurst, *ibid*, at 1473; and Leary, 1929 Ga. Laws, Vol. I, 1121.

<sup>318</sup> 1931 Ga. Laws, Vol. I, 755.

<sup>319</sup> 1937 Ga. Laws, Vol. II, 1128.

<sup>320</sup> 1941 Ga. Laws, Vol. I, 1193.

<sup>321</sup> *Ibid*, at 1505. In that same year, a provision was adopted respecting the arbitration of issues as to disability coming before the Fulton Pension Board. *See* 1943 Ga. Laws, Vol.

*Arbitration in Chambers of Commerce*

A central thesis in Bruce Mann's historical paradigm of American arbitration is that the impetus to forms of dispute resolution outside (or sometimes, as he points out, as occurred in Connecticut, *alongside*) the formal court structure in general, and arbitration in particular, is a communitarian impulse and proceeds in the main from a sense of shared values and priorities within a definable subgroup of society.<sup>322</sup> Arbitration in the early colonial experience was

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I, 995. The legislature's stipulation of arbitration in this instance was as unusual as it was creative: on March 3, 1939, the legislature had adopted an act authorizing the Board of Commissioners of Roads and Revenues for Fulton County to establish a pension system for county employees. *See* 1939 Ga. Laws 571, as amended on March 27, 1941, by 1941 Ga. Laws 846. The 1943 amendment created a Pension Board to process claims for pensions and provided that:

... if, during the course of [an] investigation [into an individual's entitlement to pension benefits and rights], either the applicant or Fulton County shall demand arbitration upon any question of disability of a living person, such arbitration shall be granted by referring the question of disability to three physicians licensed to practice medicine in the State of Georgia. One physician so licensed, shall be named by the party making the demand by the written selection filed with the Clerk at the time demand is made. The opposite party shall, within five days, likewise name his physician and the two so chosen shall select a third physician. Such physicians shall thereupon examine the applicant and determine whether or not the applicant is disabled as claimed. The decision of the majority of physicians so selected shall be conclusive upon all parties on the question of disability and extent thereof and shall be incorporated in the judgment of the Pension Board as a part thereof.

1943 Ga. Laws, Vol. I, 1001-1002.

<sup>322</sup> Mann notes:

Connecticut in the seventeenth century was a small society. The universe for most people was the town in which they lived. It is difficult now to imagine what this meant. The average town contained perhaps a hundred families, five or six hundred people, most of whom lived within a few hundred yards of the center of town. Where houses stopped, field and forest began. People not only knew one another, they knew one another in

centered upon shared religious interests and ethnic ties, so Mann's argument goes (and as we have seen here with the Salzburgers in early Georgia); over time, as faith communities and immigrant groups assimilated into the broader American society and as that society itself became more heterogeneous, other shared interests came to the fore as the foundation for a renewed interest in arbitral procedures for the resolution of disputes.<sup>323</sup>

The process which Mann recorded for Connecticut was also observed by Auerbach in the mid-Atlantic region as well where wider, more secular communal bonds competed with the religious as the cement of society:

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a variety of contexts. Of course, there are times when knowing one's fellow townspeople may be small comfort. Nevertheless, the interdependence of the early settlers, born as it was partly of choice and partly of necessity, gave the first towns a powerful cohesiveness. A voluntary process such as arbitration could work in such communities either because of trust, which one would expect in covenanted communities, or because of naked self-interest, which one would expect in all communities in which survival depended on cooperation.

Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. Rev. 443, 448-449 (1984) (footnotes omitted).

<sup>323</sup> Mann posits that the weakening of family ties as a basis of consensual, voluntary arbitration was counterbalanced by a rise of commercial interests as a primary impetus towards arbitration as a means for the settlement of disputes. *See ibid*, especially at 470-471:

Merchants in the American colonies, like their counterparts in England, required ways of settling disputes that would not delay them in their business of making money. But the institutions and special jurisdictions that supported the law merchant in England did not cross the Atlantic. Instead, colonial merchants were left largely to their own devices. Arbitration was a readily available substitute. The only authority arbitrators needed to settle disputes was that conferred by the parties in their submission. Moreover, until the middle of the eighteenth century, the mercantile community retained enough community of interest that the procedural mechanisms for enforcing arbitration awards were both unnecessary and inappropriate.

Community in colonial America was also defined by trade and commerce. Colonial merchants, like their predecessors in medieval guilds, preferred to resolve their disagreements according to familiar business custom rather than to enter the labyrinth of common-law technicalities and uncertainties. The common law was “too cruel in her frowns,” but mercantile practice could be relied upon to expedite dispute settlement without “interruption of the traffick.” As early as the seventeenth century, commercial arbitration developed along the New York-Philadelphia axis. Not only were these the major colonial commercial centers; both the Dutch in New York and the Quakers in Philadelphia had their own independent commitment to arbitration. The strong Quaker presence in western New Jersey strengthened the impetus provided by the advantageous location of that colony between the commercial cities.<sup>324</sup>

In Georgia too, as the cohesion of the ethnic and religious groups which characterized the earlier demographic patterns in the colony and state diminished and as the state first increasingly commercialized and then made initial tentative moves towards industrialization both before the War of 1861-1865 and during Reconstruction, chambers of commerce and commodity exchanges emerged as the new platforms for arbitration and the private resolution of civil disputes.

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<sup>324</sup> JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 32 (1983).



As early as 1841, the Georgia legislature had, on petition of leading merchants in Savannah,<sup>325</sup> enacted legislation to incorporate “the Chamber of Commerce of the City of Savannah.”<sup>326</sup> Although this legislation made no explicit reference to the authority of the chamber to organize an arbitration tribunal or to conduct arbitral proceedings, it did nonetheless establish the essential conditions for the conduct of such proceedings by authorizing the chamber to adopt its own rules and regulations to which its members would be subject, carefully limiting this authority to the regulation of “... intercourse between merchant and merchant, and between domestic and foreign merchants.”<sup>327</sup> The enacting legislation was careful to prohibit to the new chamber the power to adopt any “by-laws infringing the rights and privileges of any person or persons who may buy or sell in or trade to Savannah,” a provision consistent with the implicit intent of the legislature to allow the chamber to sponsor the arbitration of commercial or mercantile disputes within its membership.<sup>328</sup>

What was implicit in the authority of the Savannah Chamber of Commerce under the 1841 legislation with respect to the arbitration of civil disputes, however, was made explicit in a statute adopted three decades later in 1872 regarding the powers of the Augusta Exchange and the Chamber of Commerce of the City of Atlanta. In that year, the Georgia General Assembly voted to permit the creation of a five-member standing board of arbitration within the structure

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<sup>325</sup> These included Joseph Cumming, Benjamin E. Stiles, Godfrey Barnsley, Henry Roser, William P. Hunter, and Charles Green. *See* 1841 Ga. Laws, Vol. I, 105, especially § 1.

<sup>326</sup> *Id.*

<sup>327</sup> 1841 Ga. Laws, Vol. I, 105, at § 3.

<sup>328</sup> *Id.*

of the Augusta Exchange –the first such in Georgia legal history. The powers of this Board were well-defined:

... when the members of said Exchange [of Augusta<sup>329</sup>], or any one claiming by, through or under them, have among themselves any matter of controversy, other than those matters of which the Superior Court, or some other court, has exclusive jurisdiction under the Constitution of this State, such matter of controversy may be submitted to said board of arbitration, by an instrument in writing, signed by the parties to the controversy, clearly setting forth the matter of controversy, and

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<sup>329</sup> The legislation was drawn rather awkwardly and, to some extent, confusingly: its dispositive provisions were expressed in terms of the authority of the Augusta Exchange to render enforceable arbitral awards, but –in the last section of the statute, almost as a seeming afterthought– these powers were made applicable to a board of arbitration of the Atlanta Chamber of Commerce as well:

... [T]he powers herein conferred on the board of managers of the Augusta Exchange are hereby also vested in the president and directors of the Atlanta Chamber of Commerce; and the arbitrators elected by the president and directors of the Atlanta Chamber of Commerce shall have the same jurisdiction and authority as is herein conferred on those chosen by the board of managers of the Augusta Exchange. All awards made by the arbitrators elected by the president and directors of the Atlanta Chamber of Commerce shall be filed in the office of the Clerk of the Superior Court of Fulton County, and all proceedings in said awards shall thereafter conform to those prescribed in this act for enforcing or resisting an award made by the arbitrators chosen by the board of managers of the Augusta Exchange.

1872 Ga. Laws, Vol. I, 138, at § 4. Subsequently, the legislature saw fit to exempt the Atlanta Chamber arbitrators from jury duty in any Fulton County court. *See* 1876 Ga. Laws, Vol. I, 384. No record has been uncovered, however, of a statute extending a similar privilege to the arbitrators of the Augusta Exchange.

time by which the award thereon shall be rendered; the board of arbitration shall thereupon hear the same, and said board, or a member thereof, shall have power to subpoena witnesses, and to issue commissions for the examination of witnesses as arbitrators under the Code of Georgia are authorized to do; and said board may adjourn, from time to time, a hearing of the matter submitted to them, but not beyond the time named in the submission for the rendition of the award; and an award of the majority of the board shall be taken and deemed the award of the board.<sup>330</sup>

Moreover, any award rendered by the Augusta board of arbitration was, in the absence of any objection thereto, to be recorded with the clerk of the Superior Court of Richmond County as though the award were a judgment of that court:

Any award so rendered, when signed by the board of arbitrators, or a majority of them, may be filed at any time thereafter in the office of the Clerk of the Superior Court of Richmond county, and if exceptions to such award, on the ground of fraud of said board, or some member thereof, in making said award, are not also filed in said office in the meanwhile, the Clerk shall enter said award, ten days after the filing thereof, among the minutes of the Court, and thereupon said award shall become the judgment of the court, and thereupon execution in pursuance of the award may issue and be enforced in the manner of executions from the

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<sup>330</sup> 1872 Ga. Laws, Vol. I, 138, § 2. The “Code of Georgia” referred to in the statute is the Cobb 1863 Code, discussed *infra*.

Superior Court, and shall also be entered on the execution docket. The judgment so entered as aforesaid shall be final and conclusive between the parties.<sup>331</sup>

Under legislation enacted ten years later in 1882, the Board of Arbitration for the Atlanta Chamber of Commerce, created under the terms of the 1872 law as an almost mirror image of the Arbitration Board of the Augusta Exchange, was enlarged from a membership of five up to fifteen members; no corresponding legislation similarly increased the arbitration board membership of the Augusta Exchange.<sup>332</sup> Of greater significance, however, was the provision of the 1882 law effectively permitting the enlarged Atlanta Board to sit in three-member panels<sup>333</sup> and allowing the arbitration of claims of parties not members of the Atlanta Chamber of Commerce:

Persons, firms and corporations not members of the [Atlanta] Chamber of Commerce, having a difference with any person, firm or corporation a member of the Chamber, may submit the same to arbitration, as provided in said original Act [of 1872] and in this act, and the decision shall be binding, as therein provided.<sup>334</sup>

This proviso significantly extended the impact of the Chamber arbitration law and represented from a conceptual perspective a major advance in the promotion of commercial arbitration in the State of Georgia. Similarly important was the stipulation of the act that the “president and directors of the Atlanta Chamber of Commerce may make rules for the

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<sup>331</sup> 1872 Ga. Laws, Vol. I, 138, § 3.

<sup>332</sup> 1882 Ga. Laws, Vol. I, 668, § I.

<sup>333</sup> *Ibid*, at § II.

<sup>334</sup> *Ibid*, at § III.

government of said board of arbitrators not inconsistent with law,” a provision permitting the board to devise its own rules of procedure, appointment of arbitrators, challenges to their authority and other related issues.<sup>335</sup>

As decades wore on and as Georgia’s urban centers became more densely populated, more diverse and heterogeneous in nature, municipal entities denominated “Chambers of Commerce” ceased to be created directly by the Georgia General Assembly, although city charters not uncommonly provided for their establishment by city governments.<sup>336</sup> Legislative records affirm that the legislature would, from time to time, intervene to create “boards of trade,” a term which, in the mid- and late nineteenth century, seems to have been used interchangeably with the expression “chamber of commerce.” With time, however, the denomination “board of trade” came to be more closely associated with specific product sectors and lines of production,<sup>337</sup> just at the same period when the mercantile and business interests represented by

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<sup>335</sup> *Ibid*, at § IV.

<sup>336</sup> See, for example, the 1918 legislation creating a new charter for the City of Calhoun in north Georgia and determining that the city could, if it so elected, “establish a bureau for the commercial and business interests of the city,” and allowing the officials of the city to make fundamental determinations of that office including “the scope of its work, the duties devolving upon its membership, its officers, and appropriate such sums for its maintenance as they deem proper.” 1918 Ga. Laws, Vol. I, 563, at § 95. Such a subordinate organ seems a far cry from the semi-autonomous, merchant-created and -driven commercial power centers of the mid-nineteenth century, the later organizations apparently given over more to city “boosterism” than to internal policing and control of mercantile standards and procedures.

<sup>337</sup> The “boards of trade” known in earlier Georgia legal history were of at least two types: some were geographically restricted to the advancement of *general* business interests within a given community, for example the Columbus Board of Trade referenced in 1890-1891 Ga. Laws, Part VI, 523, and the Clarkesville Board of Trade established in 1917 by 1917 Ga. Laws, Part III, 581, as a part of the new Clarkesville city charter. More narrow in focus but still geographically restricted was the Port of Brunswick Board of Trade which seemed centered on maritime issues. *See* 1899 Ga.

the typical Georgia “chamber of commerce” were broadening and becoming more comprehensive in terms of the commercial interests which it served.

To the extent that the official reports of the Georgia Supreme Court are any accurate measure, however, the most active source for institutional arbitral activity in nineteenth century Georgia was neither the chambers of commerce nor the boards of trade: the commodity exchange –and in nineteenth and early twentieth century Georgia this meant, almost invariably, a cotton exchange– held the position of primacy in this respect. A number of these are documented to have existed and functioned –among them, those in Bremen,<sup>338</sup> Rome,<sup>339</sup> Augusta,<sup>340</sup> and,

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Laws, Part IV (Resolutions), 520. The second common form of board of trade, much later in appearance, was commodity and sector-specific, sometimes tied to a given city but not unusually having state-wide fields of activity. *See, e.g.*, the Tobacco Board of Trade created by 1962 Ga. Laws, Vol. I, 102, an act specifically authorizing arbitration resolving disputes between tobacco warehousemen “as to any matter authorized under the provisions of this Act.” These forms of boards are more accurately seen as descending from the commodity exchanges of the nineteenth century, discussed above, rather than from the broader-based and more widely representative chambers of commerce.

<sup>338</sup> The Bremen Cotton Exchange maintained its own board of arbitrators well into the twentieth century. In *B. B. Ford & Co. v. Stewart-Morehead Co.*, 145 Ga. 802 (1916), the Superior Court of Bibb County enforced a so-called “arbitration certificate” –an award of that board– which resulted from a board ruling that the plaintiff Stewart-Morehead Company was due the sum \$1,308.41 on account of a quality price adjustment in a cotton sale transaction with defendant B. B. Ford Company. This order was later affirmed by the Georgia Supreme Court. The decision suggests that it was the practice of the board, on complaint of a party to a cotton sale subject to its rules, to ascertain whether there was any deviation in contract weight, quality or cotton type and, on finding the complaint was well founded, to simply issue a certificate in the nature of a negotiable instrument to the prevailing party apparently on the account of the losing party, a remarkably efficient and no frills method of resolving the disagreement, issuing an award, and executing the same *instanter*.

<sup>339</sup> The manager of the Rome Cotton Exchange was charged with criminal violations in *McGhee v. State*, 92 Ga. 21 (1893), “[t]he charge being that the accused [McGhee] did engage in the business of selling and buying, ‘through regularly organized stock and cotton exchanges and boards of trade,’ various farm products and other property

foremost among them all, Savannah— but none of these based in Georgia<sup>341</sup> appear to have been brought into existence by legislative fiat<sup>342</sup>; rather, they seem to have emerged out of the

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enumerated in the [tax act which was the basis of the indictment] mentioned, and the proof showing that he carried on this business in the Rome Cotton Exchange, of which he was manager, the state was not required to show, further, that he placed his orders with exchanges or boards of trade elsewhere.”

<sup>340</sup> *See Dozier v. Davison & Fargo*, 138 Ga. 190 (1912), in which the rules of the Augusta Cotton Exchange were invoked by the parties to a cotton sale transaction to determine the quality classification and weight of the cotton concerned.

<sup>341</sup> Of course, out-of-state cotton exchanges were active in Georgia as well. *See, e.g., Benton v. Singleton*, 114 Ga. 548 (1902), in which the plaintiff sought to enforce an arbitral award under the New York Cotton Exchange rules against a defendant in Jasper County, Georgia, where the court ruled that the underlying contract was illegal under Georgia law as a futures transaction (and, hence, under the prevailing law, a wager) and the award of the New York Cotton Exchange unenforceable:

... it by no means follows that any conclusion which a board of arbitrators may reach with respect to such matters is likewise final and conclusive. On the contrary, while the law favors the submission to arbitration of disputes arising between individuals over private matters as to which they alone are concerned, the submission to arbitrators of questions in which the public at large is interested is not only discountenanced, but positively forbidden. Thus ‘parties cannot submit to arbitration the question of the liability of a person to a criminal prosecution, or matters of an illegal nature, or a claim which is absolutely forbidden by statute.’ 6 Lawson, Rights, Rem. & Prac. § 3306. To the same effect, see *Morse*, Arb. 53, and 2 Am. & Eng. Enc. Law (2d Ed.) 557, 558.

*Benton v. Singleton*, 114 Ga. 548 (1902). Issues implicating the New Orleans Cotton Exchange also came before Georgia courts. *See Phelan v. Vestner*, 125 Ga. 825 (1906); *Barrett v. Butler*, 52 Ga. App. 704 (1936); *but cf. Allen v. Sams*, 31 Ga. App. 405 (1923).

<sup>342</sup> It may well have been that the cotton exchanges of the State, given the history of the Chambers of Commerce and Boards of Trade before them, actively avoided the cooption by the government which state chartering would have entailed. Lack of formal charter did not, however, cause the General Assembly to pause before granting special privileges to the Savannah Cotton Exchange where, for instance, it was necessary to allow the Exchange to encroach on public property to construct Exchange buildings in Savannah. *See 1884 Ga. Laws*, Vol. I, 386. These same buildings —located just back from River Street in the city’s historical district— serve today as a priceless architectural heritage of Georgia’s nineteenth century commercial history.

perceived self-interest of merchants seeking effective mechanisms for internal self-discipline and control, especially as to issues of pricing, uniformity of standards and the enforcement of internal commodity rules and procedures.

The Savannah Cotton Exchange –its rules, its procedures, its arbitral processes– made regular appearances in the pages of the Georgia appellate reports<sup>343</sup> during the years between 1875 and 1924; a number of these decisions directly framed issues concerning the arbitral processes of the Exchange.

When the firm of Tison & Gordon, for instance, obtained an arbitral award under the rules and procedures of the Savannah Cotton Exchange against the firm of Warfield & Wayne –both of these commercial companies then being members of the Exchange– Warfield & Wayne refused for reasons not fully revealed by the historical record<sup>344</sup> to pay the amount of the award to the prevailing party. In light of this refusal, the Savannah Cotton Exchange initiated procedures to expel the defaulting member firm from its rolls. This expulsion was premised upon the terms of Article 7 of the Association of the Savannah Cotton Exchange which provided that:

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<sup>343</sup> *See, inter alia*, Savannah Cotton-Press Association v. McIntyre, 92 Ga. 166 (1893); Flannery v. Harley, 117 Ga. 483 (1903); Wall v. Bashinski Brothers, 8 Ga. App. 592 (1911); Bashinski Brothers v. Lake, 9 Ga. App. 352 (1911); Batts v. J. H. C. All & Son, 137 Ga. 358 (1912); Lunsford v. Milledgeville Cotton Co., 11 Ga. App. 62 (1912); Kelly v. Butler, Stevens & Co., 12 Ga. App. 794 (1913); and Graham v. John Flannery Co., 32 Ga. App. 713 (1924).

<sup>344</sup> Before both the trial and the appellate courts, Warfield & Wayne argued that the arbitral tribunal had no subject matter jurisdiction to entertain the matter, but the precise basis of this position, if any there was, is not revealed in the appellate report of the case. *The Savannah Cotton Exchange v. The State ex rel. Warfield & Wayne*, 54 Ga. 668 (1875).



any member who shall be accused of willfully violating the constitution and bylaws, or of fraudulent breach of contract, or of any proceeding inconsistent with the just and equitable principles of trade, or of other misconduct, may, on complaint, be summoned before the full board of directors [of the Exchange], and if the charges against him be, in the opinion of the board, substantiated, he may, by a vote of not less than two-thirds of the members of the board, be suspended or expelled from the exchange.<sup>345</sup>

When this action was taken against the firm, Warfield & Wayne brought a mandamus action against the Exchange, contesting the validity of the expulsion. In an opinion which may be read as expressing a certain pique that the Exchange defended itself on the basis that its action against its recalcitrant member was not subject to official judicial review in the public courts, the Georgia Supreme Court affirmed a ruling by the trial judge in the Superior Court of Chatham County finding the action of the Exchange subject to examination in the regular courts:

In our judgment, the facts as disclosed in the record, did not make out such a cause of complaint against the relators as would have authorized the defendant either to have suspended or expelled them from the exchange under the provisions of the 1<sup>st</sup> section of the article of its own fundamental articles of association. ...

The only complaint against the relators that we can discover is, that they refused to pay Tison & Gordon \$435.32 which they claimed had been awarded to them by an arbitration against which the relators protested and which they respectfully insisted the arbitrators had no jurisdiction to make, but if they had, the award

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<sup>345</sup> *Id.*

could have been only enforced as any other common-law award. ... If the defendant has the power and authority to act as an arbitration court under its charter, in relation to all claims of one of its members against another, arising from cotton transactions, its decisions and awards are subject to be reviewed and examined, as far as the legal rights of the parties are concerned, by the judicial tribunals of the state, in the same manner as the awards of other arbitrators are reviewed and examined.<sup>346</sup>

Other cases controlled by the arbitration provisions of the Savannah Cotton Exchange received much more perfunctory –and supportive– action at the hands of Georgia’s appellate courts.<sup>347</sup>

Although arbitral procedures before commercial chambers, boards and associations of the type reviewed here are not today the most prominent feature of these organizations, this historical function and significance remains an important feature of the evolution of arbitral policy in Georgia, especially in the mid- and late nineteenth century.

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<sup>346</sup> *Id.*

<sup>347</sup> See, e.g., *Cooper v. Dixie Cotton Co.*, 144 Ga. 3 (1915), where a defendant questioned the mutuality of a contract signed on its behalf by an agent of the plaintiff. The Supreme Court affirmed an order of the Superior Court of Emanuel County upholding the contract against the defense that it was unilateral, noting that the contract terms provided that “ ... in case of disagreement under this contract as to weight of the bale, or the interpretation thereof, such matters should be settled by arbitration, and, in the event of disagreement as to the grade of the cotton, that samples should be sent to the Savannah Cotton Exchange for classification, which should be final.”

*Public Law Arbitration in Georgia at the Beginning of the Twenty-First Century*

As the twentieth century drew to a close, a large number – perhaps even a majority – of the public law forms of arbitration which had been adopted by the Georgia legislature in the preceding two hundred and fifty years (such as those regarding commercial and mercantile chambers, boards and associations considered *supra*) had either been repealed, merged into other statutes, or had simply fallen into desuetude. A surprisingly large number of the old statutes, however, had survived the ravages of time and emerged intact into the new twenty-first century. Perhaps among the oldest of these was the arbitral process adopted by the legislature during the 1861 war permitting the arbitration of disputes as to damages caused by water diversions (as well as the necessity for the diversions themselves) by an arbitral panel formed pursuant to the state’s general arbitration code.<sup>348</sup> The power of a guardian to compromise by arbitration contested claims involving a ward, first granted by a statute adopted in the Georgia legislature in 1863, is preserved in the modern code of Georgia laws as well.<sup>349</sup>

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<sup>348</sup> See 1862-1862 Ga. Laws 171, at § 1. This statute now appears in codified form as O.C.G.A. § 44-9-72.

<sup>349</sup> 1863 Original Code, § 2500, codified as O.C.G.A. § 29-2-16. That statute was adopted to allay concerns harbored at common law over the distinction between a “debt,” on the one hand, and a “claim,” on the other. At common law, it appears, guardians were vested with authority to settle and compromise claims in favor of a ward. The Georgia codification of the common law was broad and reaching, and granted extensive powers to the guardian to arbitrate all such matters:

A guardian is authorized to compromise all contested or doubtful claims for or against the ward he represents and may submit such matters to arbitration. A debtor may be released by the guardian if the release is in the interest of the ward. Furthermore, the guardian may appoint an attorney in fact in the matter, for whose acts the guardian shall be responsible.

The bulk of the provisions relating to arbitration now appearing in the official Georgia code, however, are of a far more recent vintage and these, attesting to the flexibility, adaptability, and utility of the arbitration process, address the resolution of matters which hardly could have been conceived in the Georgia of the eighteenth or nineteenth centuries. The establishment of a power in the Georgia Insurance Commissioner to create panels for the arbitration of disputed property damage claims under personal private passenger motor vehicle policies would hardly be an issue, for instance, in an age when motor vehicles did not exist and the office of the insurance commissioner itself would not come into being until far in the future.<sup>350</sup> Similarly, the adaptation of arbitral processes to resolve civil disputes regarding the assessment of development impact fees<sup>351</sup> and respecting complaints alleging violations of Georgia's Fair Housing laws<sup>352</sup> is reflective of concerns which did not exist before the turn of the twentieth century.

Perhaps among the best known and recognized of the extant public law arbitration forms in Georgia—in large part owing to the wide impact of the law authorizing it—is that which permits the arbitration between employers and employees of disputes falling within the ambit of Georgia's labor and industrial relations laws. This possibility was contemplated as far back as

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*See* Campbell v. Atlanta Coach Co., 58 Ga. App. 825 (1938).

<sup>350</sup> 1991 Ga. Laws, 1608, at § 1.12, appearing now as O.C.G.A. § 33-34-8.

<sup>351</sup> *See* O.C.G.A. § 36-71-10, adopted as 1990 Ga. Laws 692, at § 1.

<sup>352</sup> *See* O.C.G.A. § 8-3-209, enacted as 1990 Ga. Laws 1284, § 1, providing for the possibility of binding arbitration in connection with conciliation procedures initiated after the filing of a complaint alleging violations of the Georgia Fair Housing laws. This statute goes forward to identify permissible forms of relief in the arbitration procedure, contemplating money damages among these. *See generally* O.C.G.A. Title 8, Chapter 3, Article 4.

the original adoption of a statutory scheme to regulate labor conditions in the state<sup>353</sup> but was afforded a more modern application after the midpoint of the century by the explicit statutory prohibition in 1966 of sex discrimination in employment in Georgia.<sup>354</sup>

Responding to the growing consumer movement in United States, a number of jurisdictions in the nation attempted, especially in the 1980s and 1990s, to create special mechanisms and procedures whereby consumer complaints against manufacturers and retailers of a variety of consumer products, goods, and services could be heard expeditiously, with little expense, and with only truncated and severely limited involvement in conventional court structures or procedures. In many states, this led to an elaborate growth in alternative dispute resolution mechanisms, including arbitration, to address such grievances.<sup>355</sup> In 1994, Georgia

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<sup>353</sup> See O.C.G.A. § 34-2-6, adopted originally as 1911 Ga. Laws 133, §§ 2, 5. In its modern form, this statute specifically authorizes the Georgia Commissioner of Labor “to do all in his power to promote the voluntary arbitration, mediation, and conciliation of disputes between employers and employees and to avoid strikes, picketing, lockouts, boycotts, blacklisting, discriminations, and legal proceedings in matters of employment.” To accomplish this end, the Commissioner is empowered to “appoint temporary boards of arbitration, provide necessary expenses of such boards, order reasonable compensation not exceeding \$15.00 per day for each member engaged in such arbitration, prescribe rules for such arbitration boards, conduct investigations and hearings, publish reports and advertisements, and do all things convenient and necessary to accomplish the purpose of this chapter.”

<sup>354</sup> 1966 Ga. Laws, 582, at § 6, appearing now as O.C.G.A. § 34-5-6. The statute tracks the familiar patterns of arbitration which developed in the course of the nineteenth and twentieth centuries calling for the appointment of one arbitrator by each of the disputing parties. Unusually, however, the third party arbitrator in such sex discrimination arbitration brought under Georgia’s Sex Discrimination in Employment statute is to be appointed by the senior judge of the superior court in a county (selected by the two party-appointed arbitrators) adjoining that in which the employer has the place of business where the discrimination allegedly took place. This judge-appointed arbitrator is to serve, as the statute has it, as “the chairman of the arbitration committee.”

<sup>355</sup> The history of the alternative dispute resolution movement in the United States is documented by a vast number of resources, much of it addressing specific aspects of that

joined this growing movement, in that year adopting a comprehensive statute governing “motor vehicle warranty rights” which, among other features, provided a mechanism whereby such statutory rights could be enforced through arbitral processes.<sup>356</sup> Under the terms of the statute, which came quickly and popularly to be known in Georgia as the “Lemon Law,” the administrator of the statutory program was empowered to create “new motor vehicle arbitration panels,” informal tribunals forbidden any affiliation with any manufacturer or new motor vehicle dealer, and supported in its functions by staff persons having automotive technical expertise.<sup>357</sup> The administrator was charged to develop procedures for presentation of oral and written testimony before the panels, mechanisms for the production of records and documents, the issuance of subpoenas, and the receipt of written affidavits of employees and agents of dealers, manufacturers, parties to the transaction, or from any other potential witness to any violation of the rights in the warranty rights law.<sup>358</sup> Consumer resort to the provisions of the “Lemon Law” was virtually insured by a provision in the act requiring that, before any common law action could be filed in any Georgia court in consequence of a breach of an automobile warranty by a dealer or manufacturer, the purchaser must first have exhausted all available remedies, including that of arbitration, made available by the act.<sup>359</sup> The procedures for use in connection with the

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evolution, but a good effort to come to terms with the general parameters of the phenomenon is Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165 (2003).

<sup>356</sup> See generally O.C.G.A. § 10-1-786, adopted into law as 1990 Ga. Laws 1013, § 1.

<sup>357</sup> O.C.G.A. § 10-1-786(a).

<sup>358</sup> O.C.G.A. § 10-1-786(b) (1)-(4).

<sup>359</sup> O.C.G.A. § 10-1-786(c).

work of the arbitration panel were determined by the statute,<sup>360</sup> including the duty of the panel to reject any consumer claim deemed to be frivolous or supported by insufficient evidence.<sup>361</sup>

Georgia's "Lemon Law" was hardly a toothless tiger: the arbitration panel, on finding a violation of the act, was empowered to enter an award extending to repair of the motor vehicle, repurchase of the vehicle (including payment to the consumer of all collateral charges and incidental costs), or replacement of the vehicle.<sup>362</sup> Failure of the manufacturer or dealer to comply with the award within forty days of notice of its provisions could, under the terms of the law, result in a fine of \$1,000 each day until compliance.<sup>363</sup> Despite the notoriety with which the adoption of the Lemon Law was accompanied, it does not appear to have been frequently invoked in practice.<sup>364</sup>

Despite the novelty of many of the applications of the arbitral process in the public law arena in the last half of the twentieth century, among the very last arbitration statutes adopted by the General Assembly in that century was one which, ironically in some respects, would have been quite at home had it been passed by the Georgia legislature two hundred years earlier in the

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<sup>360</sup> O.C.G.A. § 10-1-787

<sup>361</sup> O.C.G.A. § 10-1-787(c).

<sup>362</sup> O.C.G.A. § 10-1-784.

<sup>363</sup> This fine would accrue until a sum twice the value of the car had been reached, or until a statutory maximum of \$100,000 had been attained. *See* O.C.G.A. § 10-1-787(h).

<sup>364</sup> In *Taylor Auto Group, Inc. v. Jessie*, 241 Ga. App. 602 (1999), *Kondo v. Marietta Toyota, Inc.*, 224 Ga. App. 490 (1997) and *Simpson Consulting, Inc. v. Barclays Bank PLC*, 227 Ga. App. 648 (1997), the act was mentioned, but only peripherally. These appear to be the only three cases handed down by Georgia's appellate courts to have made mention of the act at all, and they do not address its arbitral provisions.

eighteenth. In 1994, the Seed Arbitration Council was brought into existence by legislative act, as the statute stipulated in its own terms, to:

provide a method for assisting farmers, persons purchasing seed and commercial fruit and nut trees, and persons selling seed and commercial fruit and nut trees in determining the validity of complaints of seed and commercial fruit and nut trees purchasers against seed and commercial fruit and nut tree sellers relating to the quality performance of the seed and the identity of the variety of fruit and nut trees by establishing a committee to investigate, hold informal hearings, make findings, and render recommendations in the nature of arbitration proceedings where damages suffered by seed and commercial fruit and nut tree purchasers are caused by the alleged failure of the seed to perform as represented or to conform to the description on the labeling thereof as required by law or to be the variety of fruit or nut tree represented by the seller.<sup>365</sup>

Unique in Georgia law for its creation of a standing tribunal whose sole function was participation in an arbitral process,<sup>366</sup> the statute establishing the Seed Arbitration Council<sup>367</sup>

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<sup>365</sup> O.C.G.A. § 2-11-70(a); 1994 Ga. Laws 1761, § 1.

<sup>366</sup> An exception to this proposition is, of course, the long-running arbitral process controlled by statutory provisions adopted in connection with Georgia's claims before the United States Supreme Court in the litigation which was associated with the environmental pollution visited upon Georgia by Tennessee copper mines in the early twentieth century. This saga –it endured more than three decades– is discussed, *supra*, in this survey's Chapter One, Section 3 ("Statutory Forms of Informal and Nonjudicialized Arbitration in Georgia,"), under *Legislative Provisions for the Arbitral Resolution of Civil Disputes*.

<sup>367</sup> The membership of the council consists of a full member and an alternate member appointed by each member of the council's executive committee which in turn consists of the associate deans of both the Cooperative Extension Service and for the experimental



owed much, if not to the letter then at least to the spirit, of the Georgia Lemon Law adopted only four years earlier by the legislature. Like the earlier law, the Seed Arbitration Council statute prescribes its procedure, tasking the Agriculture Commissioner to provide technical expertise to the council from the commissioner's own staff.<sup>368</sup> The statute constituting the council specifically authorizes it to hold hearings in the discharge of its arbitral functions, and it does so in terms which would have found resonance in General Oglethorpe and those who, with him, founded the utopian colony of Georgia in 1733: the meetings are required to be informal and, moreover, while attorneys may be present at the sessions, they may not directly participate in them.<sup>369</sup> The process before the council concludes with its report of findings and recommendations which is to be transmitted to the parties, making such recommendations as it deems fair and equitable under the circumstances. The council is specifically authorized to enter a recommendation for the payment of money damages to the purchaser of defective seed or of

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stations of the College of Agriculture and Environmental Sciences of the University of Georgia; the president of the Georgia Farm Bureau Federation; the executive committee of the Georgia Seedmen's Association; and the Georgia Commissioner of Agriculture. These individuals serve gratuitously, receiving only travel allowances for their service. O.C.G.A. § 2-11-74.

<sup>368</sup> O.C.G.A. § 2-11-75(c)-(d). The commissioner is to adopt rules and regulations governing the hearings and other functions of the council, and the council may, in the discharge of its functions, examine the purchaser on the use of the seed or tree in question, or the seller on the issue of labeling and packaging of the seed or tree. It may, at its election, grow a sample of the seed or tree to production for purposes of testing compliance of the product to the seller's representations.

<sup>369</sup> O.C.G.A. § 2-11-75(c)(3): the council is to "[h]old informal hearings at a reasonable time as directed by the chairperson. At such hearing, the purchaser and seller shall be allowed to present their side of the dispute before the council. Attorneys may be present, provided that no attorney may participate directly in the proceeding . . ." In what seems an obvious exclusion of Atlanta, the statute further directs that hearings of the council are to be conducted in Tifton, Macon, Athens, or Rome. O.C.G.A. § 2-11-75(b).

nonconforming fruit and nut trees.<sup>370</sup> Lacking the draconian character of its Lemon Law analogue, no provision is made in the act for penalties against a recalcitrant seller who fails to abide by a council decision beyond a somewhat weak provision stipulating that, in any subsequent lawsuit on the same subject matter, the party electing to do so may introduce into evidence the report of the arbitration prepared by the council “ as evidence of the facts found in the report” but, significantly, the findings and conclusions of the council are not admissible as evidence before the court.<sup>371</sup>

### *Conclusion*

Informal and nonjudicial arbitration has always existed in Georgia and, as this review has indicated, such “rustic” arbitration has played an important role in the resolution of disputes in virtually every facet of public and private life in both the colony and the state, from church property disputes, contests over the evaluation of property for tax purposes, the reduction of environmental pollution, disagreements between members of mercantile boards, chambers and associations, the redress of consumer complaints about purchases, large and small, and the myriad of other disagreements offered up by the ever-changing kaleidoscope of human conflict. Even so, the “natural home” of arbitration –that arena where it has most often appeared and where it arguably has had the most utility and influence– has been the resolution of purely private (very often commercial) disputes and disagreements, subject to the formalized strictures

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<sup>370</sup> O.C.G.A. § 2-11-76 (a)(1)-(4), *passim*.

<sup>371</sup> O.C.G.A. § 2-11-76(b).

of a legal code linking it essentially and intimately with the conventional courts and their powers of oversight and coercive enforcement. It is to the history of this formal and judicialized arbitral procedure in Georgia that this study now turns.

CHAPTER TWO  
FORMAL AND JUDICIALIZED ARBITRATION IN GEORGIA:  
A DOCTRINAL AND ANALYTICAL EXCURSUS

The great variety of forms of informal and nonjudicialized arbitration known in Georgia in its colonial and early republican past continued to evolve well into the middle of the nineteenth century and the approach of war at the beginning of the 1860s; by that time, however, the early models of arbitral process which had been known in Georgia were giving way to more formal systems of arbitration which were, to a greater or lesser extent, integrated into the judicial structure as ancillary or adjunct to the dispute resolution taking place within more structured world of Georgia's courthouses. Prior to the major legislative reform initiative of 1988 considered later in this review, these earlier statutory provisions relating to formal, court-linked arbitration were a somewhat overlapping, sometimes confused and confusing, and always intricate set of legislative terms premised upon common law principles evolved in Georgia courts over time, on the one hand, and, on the other, both individual, discrete, and more comprehensive statutory provisions which were the result of specific initiatives at times in Georgia's legal past. While the pre-1988 statutory maze is now largely a matter of the history of arbitration in Georgia, and although a specific understanding of those statutes is not necessarily required for the understanding and application of the post-1988 provisions, a general analytical review of pre-1988 statutory law and doctrine touching on arbitration in Georgia is helpful in understanding not only the arbitration history of the state but also the substance and content of the terms and provisions of the 1988 reforms themselves and, therefore, the state of modern arbitration law in Georgia. The past is indeed prologue, and an appreciation of the doctrinal and analytical aspects of the statutory law of this state regarding arbitration as it existed before 1988

will also serve to underscore the importance and significance of the statutory reforms of that year.

The statutory antecedents of Georgia arbitration law extend to English roots in the period before the *de jure* foundation of the colony of Georgia in 1732. In the mid-nineteenth century, William Hotchkiss was commissioned by the Georgia legislature to prepare a compilation of statutory laws of the State of Georgia then in force,<sup>372</sup> to include the pre-revolutionary English legislation which –not being repugnant to the legal and constitutional principles of the new state– was continued of force in Georgia. In his *Codification of the Statute Law of Georgia, including the English Statutes of Force*, published in New York in 1845, Hotchkiss included, as elements of the statutory law of Georgia bearing on arbitration, seventeenth century statutes adopted in the time of William III, statutes universally and well

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<sup>372</sup> William A. Hotchkiss had begun the preparation of a digest of Georgia statutes when, in 1843, he obtained the passage of a resolution of the Georgia Senate, on the recommendation of the Committee on the Judiciary, that the state purchase up to two thousand copies of his work if, after review by a committee of three persons, these made a report attesting “to the correctness and fidelity of said codification.” See 1843 Ga. Laws, Vol. I, 230. Hotchkiss’ work –formally, CODIFICATION OF THE STATUTE LAW OF GEORGIA, INCLUDING THE ENGLISH STATUTES OF FORCE (New York: 1845) was not, of course, a “codification” in the strict sense but rather a *digest*: it was not intended to be a legally binding restatement of the law but rather a re-publication of existing statutory law, organized in a rational and accessible way for the use primarily of the bench and bar. See Chanin & Cassidy, GUIDE TO GEORGIA LEGAL RESEARCH AND LEGAL HISTORY (1990). In 1845, the legislature appropriated \$11,500 for payment to Hotchkiss for his “Codification of the Statute Laws of the State.” 1845 Ga. Laws, Vol. I, 4. In 1847, the legislature authorized the provision of copies of the Hotchkiss’ work to official libraries in other states and territories of the federal union “to reciprocate the courtesy of such States as have presented us with their respective State Histories, by transmitting to them severally a copy of the History of Georgia; and also to extend the same courtesy to any individual who may present the State with valuable statistical, geographical and historical works for the public library.” See 1847 Ga. Laws, Vol. I, 312.

known in the general history of arbitration, and which arguably can be said to have directly affected arbitration and its development in Georgia in the late eighteenth century and the first half of the nineteenth century:

It shall and may be lawful for all merchants and traders, and others desiring to end any controversy, suit or quarrel, controversies, suits or quarrels, for which there is no other remedy but by personal action or by suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his majesty's courts of record, which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof, may by the witnesses thereto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court, that the parties shall submit to, and be finally concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission.

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And in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant

in such court, and the court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution, by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made to appear on oath, to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration or umpirage, was procured by corruption or other undue means.<sup>373</sup>

Yet another seventeenth century English statute was cataloged by Hotchkiss as having force and effect in Georgia:

Any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or

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<sup>373</sup> 9, 10 William III 1698, xv 1, Schley 303-304. On William Schley's earlier compilation of English statutory law effective in Georgia at the time of the Revolution (May 14, 1776), see Erwin C. Surrency, *The Georgia Code of 1863 and Its Place in the Codification Movement*, 11 J. SOUTHERN LEG. HIST. 81 (2003). Writing in *Kulukundis Shipping Co., S.A. v. Amtrog Trading Corp.*, 126 F.2d 978 (1942), Judge Frank noted with respect to these early parliamentary efforts:

... Parliament ... enacted a statute, 9 Wm.III c. 15 (1698), designed to remedy the situation by providing that, if an agreement to arbitrate so provided, it could be made a "rule of court" (*i.e.*, a court order), in which event it became irrevocable, and one who revoked it would be subject to punishment for contempt of court; but the submission was revocable until such a rule of court had been obtained. This statute, limited in scope, was narrowly construed and was of little help. The ordinary executory arbitration agreement thus lost all real efficacy since it was not specifically enforceable in equity, and was held not to constitute the basis of a plea in bar in, or stay of, a suit on the original cause of action. In admiralty, the rulings were much the same.

umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties.<sup>374</sup>

Supported by continuing English statutes such as these of William III providing for formal arbitration linked to the court system and by a robust tradition of resort to informal arbitration throughout the colony and the young state, arbitration remained a staple feature of dispute resolution in Georgia throughout the end of the eighteenth century when, in 1799, during virtually the last meeting of the Georgia legislature prior to the close of that century, the General Assembly adopted –as an integral part of the famous Georgia Judiciary Act of that year– its first initiative in the field of arbitral dispute resolution. This statute was to remain of force and effect in Georgia for nearly one hundred and ninety years, being repealed by the legislature only in 1988:

In all matters submitted to reference by parties, in a suit under a rule of court or other agreement in writing signed by the parties, judgment shall be entered up by the party in whose favor the award is given, and execution shall issue for the sums awarded, to be paid as they respectively come due, and to be levied on the property of the party against whom the judgment shall have been entered up, and such other proceedings shall be had thereon by the court as in cases of judgments entered up on verdicts of juries: Provided, that no judgment shall be entered upon an award where it shall appear any other cause or causes stand on the docket of the court against the defendant or defendants, undetermined, before the cause in which a rule or other agreement in writing for arbitration is entered.<sup>375</sup>

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<sup>374</sup> 9, 10 William III 1697, xv 2, Schley 306.

<sup>375</sup> See 1799 Ga. Laws, Vol. I, 33, § 30; OLIVER H. PRINCE, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 212-213 (Milledgeville: 1822), previously codified as O.C.G.A. § 9-9-70 (repealed 1988). Among the very few other general arbitral statutes (*i.e.*, those not restricted in their terms to application within a specified agency, institution, or



The stage was thus set in Georgia for an elaboration of the statutory framework for arbitration in the nineteenth century. That elaboration was to prove itself of spectacular dimensions.

#### Section 1. The Common Law of Arbitration in Georgia, Codified and Uncodified

Given the generally supportive nature and affirmative character of these statutory initiatives of the late eighteenth and early nineteenth century, arbitration then developed apace on an *uncodified*, common law basis in the Georgia courts, a form of arbitration practice rooted in the daily applications of the Georgia bench and bar, and evolving largely independently of the sparse (but nonetheless very important) general statutory initiatives of the Georgia legislature adopted before the mid-point of the nineteenth century. The decisional law surviving from this early period of Georgia's arbitration history – essentially, the period after the adoption of the

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corporation) adopted by the General Assembly of the State of Georgia before the middle of the nineteenth century was one addressing arbitration in the context of land evaluations in condemnations by railroad companies:

In all cases where a majority of appraisers, appointed under the authority of any act or acts of incorporation of any railroad, or railroad and canal company, shall agree, and return their award in conformity to the rules provided in such act or acts of incorporation, the same shall be deemed and held to be the award of the appraisers, and such other proceedings by appeal or otherwise, shall be had thereon, as are provided for in said act or acts of incorporation, severally.

*See* 1839 Ga. Laws, Vol. I, 191, § 1. Other major general arbitration statutes of the nineteenth century, including the important legislation of 1856 and 1863, are reviewed in some detail, *infra*.

1799 “submission to reference” statute but before the legislature’s adoption of Georgia’s first true arbitration *code* in 1856– provides the student an unsurpassed glimpse into a legal world now long past, somehow alien and foreign to modern assumptions regarding alternative dispute resolution but somehow, at one and the same time, oddly familiar. Few vestiges of this chapter of Georgia’s legal past remain with us today.<sup>376</sup>

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<sup>376</sup> With clear relevance, for instance, to some issues which bedevil modern arbitration practice in Georgia even at the dawn of the twenty-first century, the Georgia Supreme Court in 1850 ruled that an arbitral award may be set aside where the arbitrators, intending to decide according to the law, commit a plain legal mistake, an analogue perhaps to more modern concerns with manifest disregard of law by arbitrators in fashioning arbitral awards. *See Crabtree v. Green*, 8 Ga. 8 (1850). The same policy of low tolerance for arbitrator mistake reared its head in the later decision of the court in *King v. Armstrong*, 25 Ga. 264 (1858), where the arbitral panel had failed in its award to address the issue of the disputed use of waters from a millpond, a matter –the opinion written by Justice Benning noted– of great importance to the appellant King. Justice Benning’s decision, in which Justice Lumpkin concurred, held merely that such a mistake on the part of the arbitrators would justify the grant of a motion to set aside the award and subsequent judgment, relying on English precedent for this result. Lumpkin, pointing out that a failure to set the award aside would only lead to a later petition for injunctive relief by King in a chancery court, decried this circuitry in terms that were classic Lumpkin:

It is conceded that should Armstrong attempt to interfere hereafter, that a Court of Equity would interpose by injunction and restrain him upon the case made in the record: why this doubt, delay and expense? Equity! Equity! Equity! Drive a citizen to resort to equity to do that, which a Court of law can just as effectually do now! Such absurdity cannot long withstand the battle axe of reform and the reign of reason and common sense, ushered in with the present century, but which until within the last twenty-five years, made but little advance in overturning the superstitious devotion to precedent and antiquity, which have so long retarded the progress of legal science.

*King v. Armstrong*, 25 Ga. 264 (1858). Other decisions on Georgia’s early Supreme Court demonstrated similar intolerance for substantive or procedural irregularity in the common law arbitral process on the part of arbitrators. *See Cameron v. Castleberry*, 29 Ga. 495 (1859) (the panel’s consideration of improper evidence against the losing party will sustain a motion to set the award aside). Nor was the court a respecter of persons when it came to insistence on strict compliance with standards of fairness in common law

As every student of Georgia legal history knows, the Georgia common law originating in the courts of the state in the first half of the nineteenth century became a major theoretical foundation and source of substantive principles for the first Code of Georgia, first adopted in 1861 and to later become effective as law in Georgia in 1863, under the aegis and inspiration of Thomas R. R. Cobb and his father-in-law, Joseph Henry Lumpkin.<sup>377</sup> The “Cobb Code” was, in its entirety, formally a recapitulation of principles which had been handed down in the form of Georgia case law from the time of the Revolution: as such, it was the express intent of its framers not to introduce new principles into Georgia jurisprudence, but only to restate, organize, and rationalize the law as it had been defined by the Georgia judiciary both before the creation of Georgia’s Supreme Court in 1845 and, of course, after that point in time.<sup>378</sup>

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arbitral procedures. In *Walker v. Walker*, 28 Ga. 140 (1859), the court set aside the portion of an award with respect to which the aggrieved party had not received adequate notice of a hearing by the umpire, even though the umpire was none other than Eugenius A. Nisbet, one of the members of the original Supreme Court of Georgia as it was first constituted in 1846. In yet another opinion arising from the conduct of a common law arbitration before the outbreak of war in 1861, the court held – somewhat incongruously given the usual strictness with which it approached the discharge of common law arbitrator duties – that the legal representatives of a party in litigation had the authority to make a reference to arbitration without first obtaining the consent of the complainant. *See Wade v. Powell*, 31 Ga. 1 (1860).

<sup>377</sup> *See*, on the history of the Original Code of 1863, Jefferson James Davis, *The Georgia Code of 1863: America’s First Comprehensive Code*, 14 JOURNAL OF SOUTHERN LEGAL HISTORY, Vol. IV, No. 1 & 2, (1995-1996). *See also* Bond Almand, *The Preparation and Adoption of the Code of 1863* 14 GEORGIA BAR JOURNAL 161 (1951). A recent contribution to the scholarship in this area is Erwin C. Surrency, *The Georgia Code of 1863 and Its Place in the Codification Movement*, 11 J. SOUTHERN LEG. HIST. 81 (2003).

<sup>378</sup> The Code was formally adopted into law during the 1860 sitting of the Georgia legislature. *See* 1860 Ga. Laws, Vol. I, 24, the General Assembly stipulating “[t]hat the Revised Code of Laws prepared under its authority, by Richard H. Clark, Thomas R. R. Cobb and David Irwin, Esqr’s., and revised and fully examined by its committee, and recommended and reported for adoption, (The manuscript whereof now being on file in the Executive Department,) be, and the same is hereby adopted, as the Code of Georgia;

Under the Georgia common law rules as recapitulated by General Cobb and his committee, it was recognized that “parties disagreeing as to their rights or liabilities [might] submit the matter [in dispute] to third persons to decide, and the award made by such arbitrators will be binding on the person submitting the matter.”<sup>379</sup> The Georgia courts took the view that this code provision rendered unnecessary any order to make the award the judgment of the court, and that such awards were binding without judgment being entered through the courts unless they were attacked for fraud in the arbitrators or parties, for a palpable mistake of law, or for reference to chance or lot, as stated in the terms of the statute.<sup>380</sup>

The scope of arbitrability under the common law Cobb Code provisions was virtually unlimited and was, indeed, more exhaustive than that which was to appear in later Georgia statutes: “Nothing contained in this [code] shall prevent any party from submitting any and all

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to be of force and take effect, on the first of January, 1862.” War-time conditions delayed the effective date of the new code until 1863. *See* 1861 Ga. Laws, Vol. I, 28 (“... the ... revised Code of Laws shall go into operation the 1<sup>st</sup> day of January, 1863, and not before.”). Some consideration may have been given to additional revisions to the Code prior to its effective date, the 1861 legislation providing that “... so soon as said Code has been properly published and indexed, the Governor is authorized and instructed to take the necessary steps to furnish each member of the present General Assembly with a copy, to the end that he may examine and prepare to decide upon the merits of the same, previous to the next meeting of the legislature.” *Id.*

<sup>379</sup> O.C.G.A. § 9-9-1 (repealed 1988).

<sup>380</sup> *See* O.C.G.A. § 9-9-11 (repealed 1988). *See also* Brand v. Sorrels, 61 Ga. 162 (1878); Jones v. Bond, 76 Ga. 517 (1886); Johns v. Security Ins. Co., 49 Ga. App. 125 (1934). In addition, the Cobb Code made clear the proposition that “guardians, trustees, executors or administrators may, in good faith and with proper prudence, submit to arbitration the matters in controversy in connection with the estates they represent” and that any arbitration award rendered, with respect to disputes arising in the administration of such estates, could be made the judgment of the court. *See* O.C.G.A. § 9-9-2 (repealed 1988).

matters<sup>381</sup> of controversy to the arbitration and award of any number of arbitrators whether the matter is in litigation or otherwise. When so submitted, the proceedings shall be governed by this code and the common law.”<sup>382</sup> Consonant in spirit with this wide scope<sup>383</sup> of arbitrability, the

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<sup>381</sup> Not, strictly speaking, “all” matters, of course:

The Georgia statutes provide that agreements to arbitrate existing controversies are valid. However, the statutes make no express provision with respect to contracts calling for the arbitration of future controversies. Georgia courts ... continue[d] to apply the common-law rule that such agreements [to arbitrate future disputes] are revocable at any time prior to the rendition of the award. ... ‘[T]he mere executory agreement to submit [to arbitration] is generally revocable. Otherwise nothing would be easier than for the more astute party to oust the courts of jurisdiction.’ ... [T]he courts have continued to hold that unrestricted executory arbitration agreements are contrary to public policy and may be revoked at any time. Despite [however] the intransigent position of the Georgia judiciary regarding agreements to arbitrate all future controversies, the Georgia courts will enforce executory arbitration provisions that limit their applicability to specific questions, such as the amount of loss or damage.

*See, Note, Commercial Arbitration in Georgia*, 12 GA. L. REV. 323, 337-338 (1978). This article, appearing just before the Georgia legislature’s adoption of the Construction Arbitration Code in 1978, does not address that or, of course, any subsequent arbitration legislation in Georgia. It remains, however, perhaps the finest survey and analysis in print of the pre-1978 arbitration law of Georgia. *See also*, on the old “ouster” rule which operated generally to invalidate arbitration “future dispute” clauses in Georgia until the adoption of the late twentieth century codes, *Leonard v. House*, 15 Ga. 473 (1854) and *Parsons v. Ambos*, 121 Ga. 98 (1904); *see also* *Millican Electric Co. v. Fisher*, 102 Ga. App. 309 (1960) (contract to refer disputed matters to arbitration insufficient to oust courts of law or equity of jurisdiction and, except where agreement provides that parties shall arbitrate their differences as a condition precedent to right to sue, party may resort to courts to settle dispute).

<sup>382</sup> O.C.G.A. § 9-9-4 (repealed 1988).

<sup>383</sup> There were certainly limitations.

Under common law arbitration “any and all matters” may be submitted to arbitration. ... Yet, an award may be set aside if “defective for some manifest cause.” *Wood v. Western & Atlantic R.R.*, 95 Ga. App. 205, 207, 97 S.E.2d 556, 558 (1957). Violation of established public policy would appear to be “manifest cause.” Further, § 7-219 [O.C.G.A. § 9-9-

arbitral procedure envisioned by the Cobb Code was quite flexible, the statute providing that “pending litigation may be referred to an arbitration under an order of court by consent of the parties; and the award, when rendered, may be made the judgment of the court.”<sup>384</sup> This liberality was further in evidence in the code provisions stipulating that the agreement to arbitrate (the “submission”) could be oral and the award likewise could be rendered orally if the matter in dispute did not exceed the sum of \$500<sup>385</sup>; “however, all submissions [submitted] by persons acting as Trustees must be in writing, and the award in such a case must also be rendered in writing.”<sup>386</sup> The arbitrators were, of course, governed by the terms of the parties’ agreement to arbitrate, since arbitration was regarded as a matter of contract and consent: “[a]rbitrators should not exceed their authority. An award should cover all matters submitted and should be rendered in accordance with the terms of the submission.”<sup>387</sup> The Cobb Code contemplated,

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51(a)] authorizes a challenge to an award “otherwise illegal,” again providing statutory grounds for vacating an award violative of public policy. Of course, the courts may decline to enforce an award, as well as vacate one, on the same grounds.

Note, *Commercial Arbitration in Georgia*, 12 GA. L. REV. 323, 340 at fn. 99 (1978).

<sup>384</sup> O.C.G.A. § 9-9-3 (repealed 1988).

<sup>385</sup> O.C.G.A. § 9-9-5 (repealed 1988).

<sup>386</sup> *Id.*

<sup>387</sup> O.C.G.A. § 9-9-6 (repealed 1988). This is, of course, reflective of the basic contract rule that parties are generally not bound to a contract unless they agree to be so bound.

Both the common-law and statutory modes of arbitration in Georgia [were] premised upon the voluntary agreement of the parties to arbitrate their disputes. Arbitrability—whether the particular dispute is within the scope of the parties agreement to arbitrate—is often a source of controversy. Because the arbitration clause, whether restrictive or not, can be ambiguous as to the subject matter, the parties may disagree on whether a particular issue is within the purview of the submission. Since arbitration is a matter of contract, no one can be compelled to have a

however, those situations where the submission of the parties might be expressed in vague or general terms, broad and comprehensive, and perhaps not well defined, a situation which might very well have arisen with some frequency, given the fact that submissions could be of a verbal nature. “Under a general submission,” ran the language of the code, “the arbitrators are bound to decide only those matters brought to their consideration by the parties.”<sup>388</sup>

Anticipating modern practice which features both a single arbitrator and panels of multiple (very typically, three) arbitrators, the 1863 Code stipulated that “[i]f an umpire is provided for in the submission, an award by him alone or jointly with the arbitrators will be good.”<sup>389</sup> The framers of the 1863 Code considered as well the possibility of an award exceeding the submission of the parties, providing in such a case, that “if an award covers too much, and the excessive part can be separated from the rest, that which is good shall remain valid”<sup>390</sup>; and, by analogy, “if an award is defective in part, that which is valid, if capable of separation, shall stand.”<sup>391</sup> Case law developed under the 1863 legislation also addressed the circumstance where the award of the arbitrators did not exhaust the permissible range of the submission by the parties, providing that while an award must generally cover all the matters submitted, if the words of the award are not coextensive with the submission by the parties, the award is

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specific dispute decided by an arbitrator unless he has clearly manifested such an intention.

Note, *Commercial Arbitration in Georgia*, 12 GA. L. REV. 323, 342 (1978), *citing*, in fn. 110, *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238 (1962). *Cf.* *Bowen & Bowen Construction Co. v. Fowler*, 2004 WL 26735.

<sup>388</sup> O.C.G.A. § 9-9-7 (repealed 1988).

<sup>389</sup> O.C.G.A. § 9-9-8 (repealed 1988).

<sup>390</sup> O.C.G.A. § 9-9-10(a) (repealed 1988).

<sup>391</sup> O.C.G.A. § 9-9-10(b) (repealed 1988).

nevertheless valid, as long as it determines matters actually in dispute between the parties.<sup>392</sup> It would appear that the general policy of the courts, in the interpretation of the scope of the submission of the parties, was generally expansive,<sup>393</sup> but there were, of course, limits upon the liberality of the court, the Georgia judges holding void any award which failed to address the only issue submitted by the parties to arbitration.<sup>394</sup>

Of special concern, interest and bearing on the integrity of the arbitral process is the scope of judicial intervention available to block the enforcement of an award or to set it aside after its rendition. In this respect, the provisions of the 1863 Cobb Code reflecting the common law position of Georgia was quite broad but, at the same time, somewhat amorphous: “An award may be set aside,” the 1863 law provided, “for any unfair advantage given to either party in the hearing of the case or the rendering of the award, for fraud by the arbitrators or by either party in obtaining the award, for a palpable mistake of law, or for a reference of any matter to chance or lot.”<sup>395</sup> Under this standard, it was regularly held by Georgia courts that parties would not be generally heard to impeach the regularity or fairness of the findings of the arbitrators.<sup>396</sup> Arbitral awards under the Georgia common law provisions were viewed favorably and, as a result, the courts noted that it was a quite difficult undertaking to set such awards aside.<sup>397</sup> The appeal to

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<sup>392</sup> *Crabtree v. Green*, 8 Ga. 8 (1850).

<sup>393</sup> *See, e.g., Fowler v. Jackson*, 86 Ga. 337 (1890).

<sup>394</sup> *Beckham v. Beckham*, 129 Ga. 831 (1908).

<sup>395</sup> O.C.G.A. § 9-9-11 (repealed 1988).

<sup>396</sup> *Eberhardt v. Federal Ins. Co.*, 14 Ga. App. 340 (1913); *see also Johns v. Security Ins. Co.*, 49 Ga. App. 125 (1934).

<sup>397</sup> *Hardin v. Almand*, 64 Ga. 582 (1880); *see also Johns v. Security Ins. Co.*, 49 Ga. App. 125 (1934).



the statutory basis of fraud would have to be clearly and distinctly established before the award would be set aside on that basis.<sup>398</sup> It was also regarded as an insufficient defense to the enforcement of an award that the award was inadequate<sup>399</sup> or excessive.<sup>400</sup>

This generally supportive policy of the Georgia courts respecting the arbitral process was reflected in their determination to sustain awards except in most unusual circumstances: “where a matter at issue between two parties is submitted to third persons for their determination, and these persons render an award which does not exceed the authority given to them in the submission and is in strict accordance therewith, the parties will not be heard to impeach the regularity or fairness of their findings,”<sup>401</sup> this in application of the presumption in favor of the regularity and fairness of awards.<sup>402</sup>

There were, of course, boundaries to the tolerance of the courts in the enforcement of arbitral awards, but these were generally reflected in those defenses which one would expect in a system based upon consent and contractual agreement: while an award made in appraisal and arbitration proceedings pursuant to an insurance policy, for instance, was a creature of contract rather than of law, it could presumably be attacked for any reason which would otherwise void any other contract, and also for fraud in the arbitrators or in either party in obtaining the award, for a palpable mistake of law, or for a reference of any matter to chance or lot.<sup>403</sup> Partiality of

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<sup>398</sup> Overby v. Thrasher, 47 Ga. 10 (1872); Johns v. Security Ins. Co., 49 Ga. App. 125 (1934).

<sup>399</sup> Pacific Natl. Fire Ins. Co. v. Beavers, 87 Ga. App. 294 (1952).

<sup>400</sup> Johns v. Security Ins. Co., 49 Ga. App. 125 (1934).

<sup>401</sup> *Id.*

<sup>402</sup> Pacific Natl. Fire Ins. Co. v. Beavers, 87 Ga. App. 294 (1952).

<sup>403</sup> *Ibid*; see also O.C.G.A. § 9-9-11 (repealed 1988), discussed more fully, *infra*.

the arbitrators was, of course, a statutory basis for the refusal of enforcement of an award or for setting it aside, and the Georgia courts did not require that this partiality be reflected in an unjust award in order for this basis of defense to be available to an offended party.<sup>404</sup> As a general matter, the courts took the position that an arbitral award would not be set aside as being contrary to the evidence if there was *any* evidence to sustain the award;<sup>405</sup> but, of course, there were limits to this doctrine as well, the courts holding that “an award of an arbitrator will not be set aside on the ground that it is illegal because contrary to the evidence unless it is so contrary to the evidence as to require the inference that it is the result of an unfair advantage given to either party, fraud, accident, or palpable mistake of law or fact on the part of the arbitrator.”<sup>406</sup>

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<sup>404</sup> See *Edwards v. Employer’s Mutual Liability Ins. Co.*, 219 Ga. 121 (1963).

<sup>405</sup> *Fisher v. Gause*, 236 Ga. 663 (1976).

<sup>406</sup> *Id.* See also *Ralston v. City of Dahlonega*, 236 Ga. App. 386 (1999), a case decided long after the disappearance of former O.C.G.A. § 9-9-11 (repealed 1988), in which the Court of Appeals took pains to point out that the statutory bar to enforcement of an award made as a result of a “palpable mistake of law” –as contemplated by that former code section– did not, under the controlling precedent of the Georgia Supreme Court, survive either in the 1988 Georgia Arbitration Code or in the cases decided subject to it under the nomenclature of “manifest disregard of law.” The adoption by way of a 2003 amendment to the Georgia Arbitration Code of this latter doctrine as law in Georgia is discussed in more detail, *infra*, in this survey’s Chapter Two, Section 6 (“The 2003 Amendment to the 1988 Georgia Arbitration Code: Manifest Disregard of Law.”)

## Section 2. The Arbitration Code of 1856

The final significant intervention into the field of formal and court-linked arbitration by the Georgia General Assembly in the nineteenth century took place in the legislative session of 1856 when the General Assembly, intending to provide a counterbalance to O.C.G.A. § 9-9-70 (the statutory provision of 1799, repealed in 1988, providing for the referral to arbitration of cases then pending in litigation), adopted a special statutory code consisting of more than twenty separate sections governing arbitration in those instances when the matter was referred to arbitration “out of court,” that is, when the matter was, *at the time of submission, not* pending before a court.<sup>407</sup> This statutory initiative may have been in response to a perceived need to provide balance in the Code for the earlier statutory provisions governing “common law” arbitration and those pertaining to “in court” arbitration, but in point of fact, the Code of 1856 went further in scope than did either the 1799 legislation or that which was prepared by General Cobb in the late 1850s resulting in the Cobb Code of 1863.

The primary difference between common law and statutory arbitration [was] procedural: under the common law scheme “the award need not be made the

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<sup>407</sup> 1855-1856 Ga. Laws, Vol. I, 222-224 (§§ I-XX). As important and central as was the effect of the 1856 Code in statutorily authorizing arbitration outside of the context of pending litigation, this matter was left by the legislative terms to indirection: where the eighteenth century legislation was limited to circumstances where, “[i]n all matters submitted to reference by *parties, in a suit* under a rule of court or other agreement in writing signed by the parties, judgment [is to be] be entered up by the party in whose favor the award is given, and execution shall issue for the sums awarded,” the 1856 law was subject to no such limitation, it providing broadly that “[a]ll persons having matters of controversy may submit the same to Arbitration.” *See Ibid.*, at 222, ¶ 7, § I.

judgment of any court, but is binding on the parties until accepted to and set aside [on grounds of fraud, mistake of law, or reference to chance or lot] ... ; whereas under the [statutory scheme] ... the award must be entered on the minutes of the superior court. ...” Therefore, under common law arbitration the arbitrator’s award is binding until set aside whereas statutory arbitration [under the 1856 law] requires that the arbitrator’s award be returned to the superior court and the provisions of the statute complied with before the award is binding.<sup>408</sup>

The 1856 Code was specific in its evidentiary requirements for submissions and in the permissible scope of agreements to arbitrate:

To entitle the award to be made the judgment of the court, a submission to arbitration shall be in writing. It shall contain a clear and accurate statement of the matters and controversies submitted and any other matter that may be pertinent to submission and shall also contain the names of the arbitrators chosen by the parties. The submission shall be delivered to one of the arbitrators chosen by the parties; when this is done, the submission shall be irrevocable, except by consent of all the parties.<sup>409</sup>

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<sup>408</sup> Note, *Commercial Arbitration in Georgia*, 12 GA. L. REV. 323, 336 (1978). It is tempting to think of the arbitrator’s award under the 1799 legislation as being in the nature of the act of a special master or, perhaps, a special verdict: as an act within the authority of the court, no return is needed or necessary; the 1856 law, on the other hand, contemplated an arbitral procedure outside the ambit of the court’s normal function and therefore required a return to the court for coercive effect and force.

<sup>409</sup> 1855-1856 Ga. Laws, p. 222, § III, later codified at O.C.G.A. § 9-9-30 (repealed 1988).

This provision is, of course, significant in a number of important respects. While it was limited to the submission of existing disputes, the language of the section clarified and made certain the understanding that, once submitted to the arbitrators, the agreement to arbitrate would be irrevocable, contrary to the common law position in Georgia which provided for the revocability of agreements to arbitrate at any time prior to the announcement of the award by the arbitrators.<sup>410</sup> Similarly, the 1856 law eliminated the practice of oral submissions to arbitration, a practice long countenanced by the common law of this state.<sup>411</sup>

The 1856 Code showed a special sensitivity to issues of a procedural nature in the arbitral process. Hence, that code specified that “every arbitration under this part shall be composed of three arbitrators. One arbitrator shall be chosen by each of the parties and one shall be selected by the arbitrators chosen by the parties,” a process closely approximating that which is customary in modern arbitrations.<sup>412</sup> Again reflecting modern practice, the code provided that

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<sup>410</sup> Old practices died hard, however, and the revocability of arbitral agreements appears to have remained clouded in Georgia practice, even after the adoption of the 1856 statutory provision declaring that agreements to arbitrate would be irrevocable, except with the consent of the parties. In *Register v. Herrin*, 110 Ga. App. 736 (1964), the Georgia Court of Appeals determined that the right to revocation of the arbitral agreement would be subject to leave of the court, a matter within the sound discretion of the bench.

<sup>411</sup> O.C.G.A. § 9-9-30 (repealed 1988). *See Brannon v. Price*, 29 Ga. App. 333 (1922). Curious results would sometimes obtain because of the common law rule permitting oral agreements to arbitrate, while such oral agreements were not permitted under the 1856 legislation. For instance, where parties initiated the arbitral process in writing in strict compliance with the provisions of the 1856 law, a subsequent verbal appointment of an arbitrator would convert the procedure into one governed, not by the statute, but by common law. *See Jones v. Payne*, 41 Ga. 23 (1870).

<sup>412</sup> O.C.G.A. § 9-9-31 (repealed 1988); *see also* 1855-1856 Ga. Laws, Vol. I, 222, at ¶ 8, § II.

each of the arbitrators chosen by the parties would then cooperate to choose a third party,<sup>413</sup> with the stipulation, equally consistent with modern arbitral standards, that the arbitrators so chosen were regarded as impartial and not beholden to the party appointing them.<sup>414</sup> The 1856 Code provisions also seemingly contemplated the situation where one of the arbitrators (perhaps the parties themselves) would be recalcitrant and uncooperative in the process of selecting a third arbitrator. In such a situation, “if either of the arbitrators selected by the parties fail[ed] to attend at the time and place of meeting or [was] disqualified, the party whose arbitrator [was] absent or disqualified shall then choose another in his place. If the arbitrator chosen by the arbitrators is absent or disqualified, the arbitrators chosen by the parties shall choose another in his place. The arbitrators so chosen shall have all the powers of the arbitrators first chosen.”<sup>415</sup>

Distinguishing statutory arbitration under the 1856 legislation from the accepted practice of the common law, it was required that, in the statutory form, arbitrators proceed under oath: “[b]efore the arbitrators enter upon a hearing of a case to make up their award, they shall be sworn to determine impartially the matter submitted to them accordance to law and the justice and equity of the case without favor or affection to either party. They may administer this oath to each other.”<sup>416</sup> Under the common law, however, it had been determined that no oath was required on the part of the arbitrator before entering into the performance of his duties.<sup>417</sup> The

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<sup>413</sup> O.C.G.A. § 9-9-32 (repealed 1988); *see also* 1855-1856 Ga. Laws, Vol. I, 222, at ¶ 8, § II.

<sup>414</sup> O.C.G.A. § 9-9-34 (repealed 1988); *see also* 1855-1856 Ga. Laws, Vol. I, 222, at ¶ 17, § XI. *See also* Wilkins v. Van Winkle & Co., 78 Ga. 557 (1887).

<sup>415</sup> O.C.G.A. § 9-9-33 (repealed 1988).

<sup>416</sup> O.C.G.A. § 9-9-34 (repealed 1988).

<sup>417</sup> Southern Livestock Ins. Co. v. Benjamin, 113 Ga. 1088 (1901).

policy under the 1856 statute was emphatically to the contrary, requiring that the oath be specifically that prescribed by the statute, failing which the penalty would be the invalidity of the award.<sup>418</sup>

A host of other procedural issues was also addressed in the 1856 legislation: the statute provided for the time and place of the meeting of the arbitrators and the notice required prior to that meeting;<sup>419</sup> the requirement that the parties be notified of the witnesses to appear against them;<sup>420</sup> the question of continuances at the request of a party not prepared to go forward with the arbitration;<sup>421</sup> and adjournments by the arbitrators.<sup>422</sup> Whether a continuance was to be

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<sup>418</sup> *Wilkins v. Van Winkle & Co.*, 78 Ga. 357 (1887); *see also* *Sisson v. Pittman*, 113 Ga. 166 (1901).

<sup>419</sup> O.C.G.A. § 9-9-35 (repealed 1988) (“After the selection process has been completed, the arbitrators shall appoint their time and place of meeting, which shall be as soon as practicable, consistent with a proper preparation of the case. The parties shall have ten days notice of the time and place of meeting.”)

<sup>420</sup> O.C.G.A. § 9-9-36 (repealed 1988) (“At the time the submission is made, or as soon thereafter as may be possible, the parties shall furnish the arbitrators so chosen, or one of them, with a list of the witnesses whose testimony they desire to be before the arbitrators. Any party neglecting to furnish this information to the arbitrators within ten days after the submission is made shall not be entitled to delay or continuance for the absence of his testimony or witnesses.”)

<sup>421</sup> O.C.G.A. § 9-9-37 (repealed 1988) (“Upon the meeting of the arbitrators, if either party is not ready for trial, the arbitrators may postpone the hearing of the case to a future day, which day shall be as early as may be consistent with the ends of justice, considering all the circumstances of the case. There shall not be more than two postponements of the case, except for providential cause.”)

<sup>422</sup> O.C.G.A. § 9-9-38 (repealed 1988) (“After the arbitrators have commenced their investigations, they may adjourn from day to day or for a longer time if the ends of justice require it, until their investigations are completed and they have made up their award.”)

granted or not was, predictably enough, determined to be within the sound discretion of the arbitrators themselves under the provisions of the statute.<sup>423</sup>

The 1856 statute was sensitive as well to questions of discovery in arbitration, anticipating issues respecting the arbitral process which were not to be central in most arbitration systems until the twentieth century.<sup>424</sup> The statute addressed the taking of depositions;<sup>425</sup> the subpoena powers of arbitrators and the compensation of witnesses;<sup>426</sup> the power to compel production of documentary evidence;<sup>427</sup> and, finally, the power to administer oaths.<sup>428</sup>

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<sup>423</sup> Vinton & Davis v. Lindsey, 68 Ga. 291 (1881).

<sup>424</sup> See for a general overview of the issues raised by extensive discovery practice in the arbitration context, Sean T. Carnahan, *Discovery in Arbitration? Well, It Depends . . .*, 10 APR BUS. LAW TODAY 22 (2001); see also for a more in-depth consideration of this debate, Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OH. ST. J. DISP. RES. 633 (2001).

<sup>425</sup> O.C.G.A. § 9-9-39 (repealed 1988) (“Testimony may be taken by deposition under the same circumstances, in the same manner, and subject to the same rules as are prescribed for the Superior Courts. If the deposition is taken pursuant to written questions, the original interrogatories and the original transcription of testimony shall be filed with one of the arbitrators, provided that, if testimony is taken under subpoena, the interrogatories and testimony shall be filed with the arbitrator who issued the subpoena.”)

<sup>426</sup> O.C.G.A. § 9-9-40 (repealed 1988) (“The arbitrators shall have all the powers of the superior courts to compel the attendance of witnesses before them and also to compel witnesses to testify. Any one of the arbitrators shall have power to issue subpoenas requiring the attendance of witnesses at the time and place of their meeting, which subpoenas shall be served in the manner provided by law for the service of subpoenas in cases pending in the superior courts. Witnesses so attending shall be entitled to the same compensation as witnesses attending superior courts, which compensation may be collected in the same manner as that of witnesses in the superior courts.”)

<sup>427</sup> O.C.G.A. § 9-9-41 (repealed 1988) (“Arbitrators shall have all the powers of the superior courts to compel parties to produce books and all other papers which they may deem necessary and proper for the investigation of the matters submitted to them, giving to the party, his agent, or his attorney, from whom production is required, such notice as is required in the superior courts for the production of papers.”)

<sup>428</sup> O.C.G.A. § 9-9-42 (repealed 1988) (“Arbitrators shall have power to administer oaths to witnesses and to administer all other oaths which may be necessary for carrying this



The 1856 legislation provided a procedural benchmark for the arbitral process, decreeing that “the examination of witnesses and the admission of testimony shall be governed by the rules applicable to the superior courts, except as otherwise provided in this part,”<sup>429</sup> and also determining that all persons competent to testify in the superior courts were deemed to be competent as witnesses in all cases before arbitrators.<sup>430</sup> Deadlock among the arbitrators, or at least an inability on their part to reach a unanimous decision, was also contemplated by the 1856 legislation: “If the arbitrators fail to agree upon an award, any two of them may make an award which shall have the same force and effect as if made by all.”<sup>431</sup> In a practice suggestive of the modern trend towards allocation of procedural and administrative costs of arbitration against losing parties,<sup>432</sup> the 1856 Georgia law provided that “the arbitrators shall return in their award the costs of the case, which they may tax against either or both parties as they may think just and right.”<sup>433</sup> In construing the terms of this code section, the Georgia Supreme Court determined that the legislation did not require the arbitrators to divide the cost of the proceeding equally among the parties, but rather permitted them to allocate these costs as they, in their discretion, saw fit.<sup>434</sup> The 1856 code further required that the arbitrators furnish each of the parties with a

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part into full effect.”)

<sup>429</sup> O.C.G.A. § 9-9-44 (repealed 1988).

<sup>430</sup> O.C.G.A. § 9-9-43 (repealed 1988).

<sup>431</sup> O.C.G.A. § 9-9-45 (repealed 1988).

<sup>432</sup> This early statute anticipated twentieth century trends permitting the allocation of costs contingent on the arbitral tribunal’s assessment of fault in the underlying dispute, essentially permitting the panel to “punish” the wrong-doer in the underlying transaction and, at the same time, to hold the innocent party harmless by relieving that party of liability for such costs.

<sup>433</sup> O.C.G.A. § 9-9-46 (repealed 1988).

<sup>434</sup> *Hightower v. Georgia Fertilizer & Oil Co.*, 145 Ga. 780 (1916).

copy of their award after it had been concluded and that they return the original award to the appropriate superior court.<sup>435</sup>

In addition, the 1856 Code mandated that the award be entered on the minutes of the superior court.<sup>436</sup> After entry on the minutes, the award was, in the terms of the statute, deemed to “have all the force and effect of a judgment or decree of the court, and may be enforced in the same manner as a judgment or decree at any time after the adjournment of the court. It shall be final and conclusive between the parties as to all matters submitted to the arbitrators, unless objection is pleaded to the same” as provided in the provisions of law respecting defenses to the enforcement of awards.<sup>437</sup> The clerk was declared entitled to a fee for entering the award on the minutes<sup>438</sup> and the legislation, in addition, made specific provision as to the appropriate superior court where the award was to be so entered, setting the venue for this purpose in the superior court where the parties resided (if the matter was not one where the reference to arbitration was made from a pending case) and, in the event the reference to arbitration was from a case then pending in a court in Georgia, then in that court.<sup>439</sup>

The 1856 Code made provision for the compensation of arbitrators, providing that such compensation would be essentially by the agreement of the parties and the arbitrators, but providing for a jury trial on this question if the parties were unable to come to an agreement.

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<sup>435</sup> O.C.G.A. § 9-9-47(a) (repealed 1988).

<sup>436</sup> O.C.G.A. § 9-9-47(b) (repealed 1988).

<sup>437</sup> *Id.*

<sup>438</sup> O.C.G.A. § 9-9-49 (repealed 1988).

<sup>439</sup> O.C.G.A. § 9-9-48 (repealed 1988).

The arbitrators shall have such compensation for their services as may be agreed upon by themselves and the parties, which compensation shall be paid equally by the parties or included in the judgment or decree of the Court to which the award is returned as part of the cost in the case. ... If the parties fail to agree on the amount to be paid, the Court to which the award is returned shall direct an issue as to the amount of the fee to be formed between the parties and the arbitrators.

The issue shall be tried by a jury whose verdict shall be final and conclusive unless it is reversed; and the subsequent proceedings thereon shall be the same as in cases of appeal.<sup>440</sup>

Given the generally progressive tenor of the provisions of the 1856 statute, certain of its terms respecting defenses to the enforcement of arbitral awards come as something of a surprise.

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<sup>440</sup> O.C.G.A. § 9-9-50 (repealed 1988). The enumerated statutory defenses of the 1856 arbitration code –accident, mistake, or fraud on the part of an arbitrator or a party, or other intervening illegality– are not substantively wholly dissimilar from the defenses recognized in common law arbitration under Georgia law. See O.C.G.A. § 9-9-11 (repealed 1988) discussed above, where the 1863 Code enumerates as common law defenses to the enforcement of an award “any unfair advantage given to either party in the hearing of the case or the rendering of the award, ... fraud by the arbitrators or by either party in obtaining the award, ... a palpable mistake of law, or ... a reference of any matter to chance or a lot.” While the text and spirit of the two nineteenth century Georgia statutes appear more or less consistent one with the other, neither shares a great deal of substance with the defensive provisions of two primary twentieth century statutory renditions of available defenses, 9 U.S.C. § 10 (the Federal Arbitration Act) or § 12 of the Uniform Arbitration Act. These look to corruption, fraud, or other undue means employed to obtain the award; evident partiality by an arbitrator or misconduct prejudicing the rights of any party to the arbitral procedure; procedural error in refusing a continuance after cause being shown therefore; or other arbitrator misconduct as defenses to the enforcement or bases for the vacatur of an award. These latter defenses are considered at length, *infra*, in connection with the review in the present Chapter of this survey, in its Section 6, of the 2003 amendment to the Georgia Arbitration Code making available “manifest disregard of law” on the part of an arbitrator in fashioning an arbitral award as a basis for vacatur of that award.

Under the procedure envisioned by the 1856 Code, a judicial review of an arbitral award for the presence of one of the statutory defenses –limited to considerations of accident, mistake, or fraud on the part of any arbitrator or any party to the proceeding– would be triggered by the dissatisfied party after its return and entry on the minutes of the court: “[w]hen an award has been returned to the superior court and entered upon its minutes ..., either of the parties may suggest, on oath, at the term to which the award is returned, that the award was the result of accident, mistake, or the fraud of one or more of the arbitrators or parties, or is otherwise illegal.”<sup>441</sup> In such a circumstance, the code provided, the defense asserted was to be tried to a jury empaneled for that purpose, an ironic result for a procedure which was presumably intended by the parties to avoid the cost, expense, and intricacy of jury intervention in conventional litigation.<sup>442</sup> In the event the jury found as a matter of fact that the defense was well-grounded, the award would be vacated; if not, it would continue in force and effect, the status it obtained when first entered on the court’s minutes.<sup>443</sup> While this resort to a jury trial to test the sufficiency of a defense to or the setting aside of an arbitral award may seem contradictory and self-defeating, it should be borne in mind that the analogous provisions of the Federal Arbitration

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<sup>441</sup> O.C.G.A. § 9-9-51(a) (repealed 1988).

<sup>442</sup> O.C.G.A. § 9-9-51(b) (repealed 1988): “[t]hereupon the court shall cause an issue to be made up, which issue shall be tried by a jury under the same rules as are prescribed for the trial of appeals. The trial shall be had at the same term of court at which the suggestion is made unless good cause is shown for a continuance, when the same may be continued for one term only, except for providential cause.”

<sup>443</sup> O.C.G.A. § 9-9-51(c) (repealed 1988): “[i]f upon the trial of the issue the jury returns a verdict finding against the award on the grounds specified in the issue submitted, the Court shall forthwith pass an order vacating and setting aside the award. If the jury does not so find, the award shall remain in full force as provided in Code Section 9-9-47 and shall be final and conclusive unless the judgment of the Superior Court on the trial of such issue is reversed by the appellate court.”

Act, adopted some sixty-five years later, contemplate essentially the same cumbersome and seemingly incongruous process.<sup>444</sup>

### Section 3. The Georgia Construction Arbitration Code of 1978

After a hiatus of just over one hundred and thirty years, the Georgia legislature again acted in 1978 to statutorily supplement existing provisions of the Georgia Code regarding arbitration. In that year, the legislature amended the Code of Georgia to include two new Parts to Chapter 9, of Title 9, of the Code pertaining to arbitration: a Part 4, “Arbitration of Medical

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<sup>444</sup> 9 U.S.C. § 4 provides in terms with substantive impact not so very different from the 1856 Georgia statute:

“[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. ... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. *If no jury trial be demanded by the party alleged to be in default*, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, *the party alleged to be in default may*, except in cases of admiralty, on or before the return day of the notice of application, *demand a jury trial of such issue*, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.” (Emphasis supplied).

Malpractice Claims”<sup>445</sup> and, of more importance and relevance here, a Part 3, “Arbitration of Construction Contracts.”<sup>446</sup> Because the latter of these two sections has survived (with important modifications discussed later) as the Georgia Arbitration Code of 1988, presently appearing in Chapter 9 of Title 9 of the Georgia Code, its provisions are of more than passing interest and relevance, and will be reviewed briefly here in order to gain breadth in the understanding of the statutory pattern of arbitration now prevailing in Georgia.

The new Code of 1978, coming into effect on July 1 of that year, was limited in application to construction contracts, contracts of warranty of construction, and contracts involving the architectural or engineering design of a building, or the design of alterations or additions thereto.<sup>447</sup> Reversing the trend of the statutory arbitration laws of Georgia from the eighteenth and nineteenth centuries respecting the enforceability of agreements to arbitrate only existing—but not future—disputes, the 1978 Construction Arbitration Code provided that “a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit *any controversy thereafter arising* to arbitration is enforceable and confers jurisdiction on the courts of the state to enforce it and to enter a judgment on an award.”<sup>448</sup> Hence, both existing disputes and disputes arising after the conclusion of an arbitration agreement were deemed enforceable under this new provision.<sup>449</sup> Validity of an agreement to

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<sup>445</sup> The code provisions relative to medical malpractice now appear as O.C.G.A. § 9-9-60–83 (2001 Supp.).

<sup>446</sup> 1978 Ga. Laws 2270, § 1.

<sup>447</sup> O.C.G.A. § 9-9-81 (repealed 1988).

<sup>448</sup> O.C.G.A. § 9-9-81 (repealed 1988) (Emphasis added).

<sup>449</sup> O.C.G.A. § 9-9-82 (repealed 1988). Given the powerful resistance of both Georgia courts and the Georgia General Assembly during the eighteenth and nineteenth centuries to the adoption of an arbitral principle permitting the agreement to arbitrate future

arbitrate within the scope of the Construction Arbitration Code was contingent upon the parties' selection of arbitrators by mutual agreement or, alternatively, the appointment of one arbitrator by each party to the arbitration, with the third neutral arbitrator to be agreed upon by the two arbitrators selected by the parties; or finally, the appointment of a selection process which utilized an independent administrator, who would select from panels of proposed arbitrators previously approved by the parties. Alternatively, in lieu of specifying a method of arbitrator selection in accordance with the provisions of the Georgia Construction Arbitration Code, the parties were afforded the option of incorporating the rules of an arbitral institution to govern the proceeding, so long as these were in accordance with the provisions of the Georgia statute.<sup>450</sup>

The Georgia Construction Arbitration Code included provisions which made applicable to arbitral procedures any statutes of limitation which would have been applicable to the claim had it been presented in a conventional court procedure, making that statute of limitations a permissible basis for an application by a party to a court to stay the arbitration or to vacate any arbitral award entered in violation of any such applicable statute. The 1978 Code provided alternatively that a party could raise the issue of an applicable statute of limitations before the members of an arbitral tribunal who then would, in their sole discretion, decide whether or not the bar was to be applied. The Code specifically provided that this exercise of discretion would not be subject to the review of the court on any application to confirm, vacate or modify any award made as a result of the procedure in question.<sup>451</sup>

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disputes, the significance of this section can hardly be overstated introducing, as it does, the possibility of such a *compromis* into Georgia law for the first time. This, it can well be argued, is the most important single aspect of the 1978 arbitration legislation.

<sup>450</sup> O.C.G.A. § 9-9-83 (repealed 1988).

<sup>451</sup> O.C.G.A. § 9-9-85 (repealed 1988).

Mirroring to some extent the analogous provisions of federal law in 9 U.S.C. § 4,<sup>452</sup> the Georgia Construction Arbitration Code empowered any party, aggrieved by the failure of another to arbitrate, to seek an order compelling arbitration before any competent Georgia court.

If the Court determines there is no substantial issue concerning the validity of the agreement to submit to arbitration or compliance therewith and the claim sought to be arbitrated is not barred by limitation of time, the Court shall order the parties to arbitrate. If a substantial issue is raised or the claim is barred by limitation of time, the court shall summarily hear and determine that issue and, accordingly, grant or deny the application for an order to arbitrate.<sup>453</sup>

In a related provision, the Construction Arbitration Code provided as well that a failure to raise the issue of the validity of the arbitration agreement after the service of a demand for arbitration would constitute a waiver<sup>454</sup> of the right to resist

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<sup>452</sup> § 4 of the Federal Arbitration Act [*See* Federal Arbitration Act, ch. 392, §1, 62 Stat. 669 (1947), now codified as 9 U.S.C. §§ 1-16] permits one party to an arbitration agreement to seek an order of the court compelling the other party to comply with such stipulation, even over the objection of that party. Typically, this statutory provision is invoked when the recalcitrant party has initiated a suit in the regular courts in contravention to their agreement to arbitrate. Not infrequently, this motion to compel arbitration is joined with a related motion under FAA § 3 to enjoin the prosecution of the litigation filed in contravention to the agreement to arbitrate.

<sup>453</sup> O.C.G.A. § 9-9-86(a) (repealed 1988). This section does not appear expressly to admit of the possibility of a jury trial on the issue of the making of the agreement to arbitrate, something of an improvement over the explicit language in the federal analogue. *See* 9 U.S.C. § 4, discussed *supra*.

<sup>454</sup> Waiver of the right to arbitrate under the 1978 Georgia Code provisions could result from a variety of circumstances indicating the intention of the party not to insist on the performance of the agreement to arbitrate. Where, however, it was argued that the filing of materialmen's liens contemporaneously with a demand for arbitration was such a waiver, the Georgia Court of Appeals found no intent to waive the right of arbitration:

Appellant's argument raises an interesting issue which our courts have not yet decided. We have searched the record and have found



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nothing to indicate that appellant raised the issue of waiver in the trial court. Despite the fact that appellant did not properly raise the issues of waiver and estoppel, we note that no waiver of appellee's arbitration rights took place under the circumstances of this case. "While a distinct stipulation in a contract may be waived by the conduct of the parties, it must appear that it was the intention of the parties to treat such stipulations as no longer binding. [Cit.]" *Parker v. Schochat*, 113 Ga. App. 13, 15(1), 147 S.E.2d 58 (1966). Here, where appellee [claimant] consistently sought to enforce its right to arbitration under the contract, it is clear that it had no intention of waiving such a right. See *A. Sangivanni and Sons v. F. M. Floryan and Co.*, 158 Conn. 467, 262 A.2d 159 (1969). Had appellee flagrantly disregarded arbitration as a contractual prerequisite, filed a claim of lien and a complaint of foreclosure without attempting to enforce its arbitration rights, a waiver of the arbitration provisions of the contract may have occurred. See *Oakdale Park Ltd. v. Byrd*, 346 So.2d 648 (Fla. App.1977). Appellee is entitled to protect its rights to a materialmen's lien by filing a claim of lien and by filing a petition to foreclose said lien at the same time it is pursuing its arbitration rights under the contract. In fact, we agree with the Florida Court of Appeal that the operation of the Arbitration Code (Ga. Code Ann. § 7-301 et seq.) and the materialmen's lien law is interdependent and compatible. *Beach Resorts Intern. v. Clarmac Marine Const.*, 339 So.2d 689, 692 (Fla.App., 1976). ... Here, appellee sought to resolve a dispute under the contract by demanding arbitration, and responded to appellant's attempt to stay arbitration by seeking to enforce the contract. ... If the trial court had stayed arbitration, appellee would have been able to proceed with its claim against appellant under Code Ann. § 67-2002. Since the trial court correctly ordered arbitration, the correct procedure is to stay judicial proceedings in the lien foreclosure action and proceed to arbitration. If judicial enforcement of an arbitration award in favor of Batson-Cook is necessary, appellee (if it is otherwise entitled to a materialmen's lien) may enforce said award by means of the lien foreclosure. See *Beach Resorts*, supra, at 692. Thus, we do not view appellee's counterclaim to foreclose its claim of lien as inconsistent with its attempt to enforce arbitration under the contract, nor does said counterclaim amount to a waiver of [claimant's] contractual right to arbitrate. Accord, *EFC Develop. Corp. v. F. F. Baugh Plumbing & H. Inc.*, 24 Ariz.App. 566, 540 P.2d 185 (1975).

arbitration in the absence of an application by the resisting party within thirty days of the demand for arbitration for an order to stay the proceeding.<sup>455</sup> The statute further imposed a burden on the responding party to seek a stay of the arbitration within thirty days after the service of the demand for arbitration upon penalty of being precluded from denying the validity of the agreement or compliance therewith, or from asserting limitation of time as a bar in court.<sup>456</sup> Providing a certain symmetry for the code's provision for judicial power to compel arbitration,<sup>457</sup> the 1978 Georgia Construction Arbitration Statute further provided that any party who had not participated in the arbitration and who had not made an application to compel arbitration, would be permitted to make an application to stay any arbitration on the grounds that there was no valid agreement supporting such an arbitral procedure, that the agreement to arbitrate had not been complied with by the party seeking the arbitration, or the arbitration was barred by a limitation of time.<sup>458</sup>

Under other provisions of the 1978 Georgia Arbitration Code, it was stipulated that no arbitration agreement would be rendered nugatory for failure of the appointment of arbitrators: the default position laid down was that arbitrators were to be appointed in accordance with the agreement of the parties. Upon failure of this clearly preferable method of arbitrator appointment, the court would be authorized to make the appointment of the arbitrators. In the event that the arbitral agreement did not provide for any method of appointment, or if the agreed upon method failed, or in the event that the agreed upon method was not followed for some reason, or if the arbitrators appointed under the agreement of the parties failed to act and no successors had been appointed, then the court would step in and perform this essential function.<sup>459</sup> In the only term of the Georgia Construction Arbitration Code touching upon the

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(1982).

<sup>455</sup> O.C.G.A. § 9-9-86(b) (repealed 1988).

<sup>456</sup> O.C.G.A. § 9-9-86(c) (repealed 1988).

<sup>457</sup> O.C.G.A. § 9-9-86(a) (repealed 1988)

<sup>458</sup> O.C.G.A. § 9-9-86(d)(1)-(3) (repealed 1988).

<sup>459</sup> *See generally* O.C.G.A. § 9-9-87 (repealed 1988).

qualification of arbitrators, the legislation provided that “in appointing arbitrators [in the exercise of its default appointment power] ..., the Court shall seek to appoint persons having general knowledge and experience as to the type of dispute or controversy to be arbitrated.”<sup>460</sup>

The 1978 Code also required the administration of an oath to the arbitrators prior to commencing their duties.<sup>461</sup> Flexibility in the location of the arbitral proceedings was provided by a statutory provision permitting the arbitral proceedings to be held at a time and place appointed by the arbitrators, even though the underlying arbitral agreement may have designated another county in which the arbitration hearings were to be held. In the event the place so appointed was deemed to be unduly burdensome on any party, the court retained the power to stay proceedings pending the appointment of an alternative venue for the arbitration.<sup>462</sup> In addition, the 1978 law guaranteed fundamental due process rights in insuring that the parties would be entitled to be heard in the proceeding and to present pleadings, documents, testimony, and other matters, as well as to cross examine witnesses. Supplementing these rights of parties, the arbitrators were empowered to hear and determine the controversy upon the pleadings, documents, testimony, and other matters produced by the parties, notwithstanding the failure of a party duly notified to appear in the proceeding.<sup>463</sup>

Reflecting the provisions of modern arbitral statutes, the Georgia Construction Arbitration Code of 1978 further provided for the right to be represented by an attorney at the proceedings authorized by the statute, together with a provision that hearings held under the statute would be conducted by *all* of the arbitrators unless agreed otherwise by the parties, but preserving the right of a majority of the arbitrators to render and change an award should one or more of the arbitrators be absent.<sup>464</sup> Not unlike the comparable provisions of the Federal

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<sup>460</sup> O.C.G.A. § 9-9-87(c) (repealed 1988).

<sup>461</sup> That oath bound the arbitrator to decide the controversy “faithfully and fairly.” O.C.G.A. § 9-9-88(a) (repealed 1988).

<sup>462</sup> O.C.G.A. § 9-9-88(b) (repealed 1988).

<sup>463</sup> O.C.G.A. § 9-9-88(c) (repealed 1988).

<sup>464</sup> O.C.G.A. § 9-9-88(e) (repealed 1988).

Arbitration Act,<sup>465</sup> arbitrators under the Georgia statute were granted the legal authority to issue subpoenas for the attendance of witnesses at arbitral proceedings and to require the production of documentary records including books, records, and other documentary evidence. The production of this evidence pursuant to arbitrators' subpoenas was made subject to their explicit right to use documents and other evidentiary materials so produced in the arbitral proceedings according to the procedures to be established by the arbitrators themselves.<sup>466</sup> Any award consequent upon an arbitral proceeding under the 1978 Georgia Construction Arbitration Code was required to be in writing and signed by the arbitrators joining in that award.<sup>467</sup> In a provision which surely would be regarded today as somewhat stringent by most experienced arbitrators, the statute required the rendition of an arbitral award within thirty days of the close of the hearing in the proceeding, although the parties had the statutory right to extend the time either before or after its expiration.<sup>468</sup> The 1978 Code made allowance for the right of the arbitrators to modify an award for reasons of clerical mistake, or in the event that the arbitrators had exceeded their powers by rendering an award on a matter not within the scope of the arbitral agreement, or if the award was imperfect in any respect as to form not touching upon the merits of the controversy.<sup>469</sup>

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<sup>465</sup> Under the provisions of 9 U.S.C. § 7, arbitrators in a proceeding subject to the Federal Arbitration Act are authorized and empowered to issue a summons to a nonparty witness, the enforcement of which—in the event the party summoned fails or refuses to appear—is to be on petition to the federal district court where the arbitrators are sitting. In contrast to the federal legislation, however, the 1978 Georgia statute in O.C.G.A. § 9-9-89(a) (repealed 1988) enumerated grounds of defense to the enforcement of such a summons, *i.e.*, that the summons was unduly burdensome or oppressive as to the party to whom it was addressed.

<sup>466</sup> O.C.G.A. § 9-9-89(b) (repealed 1988).

<sup>467</sup> O.C.G.A. § 9-9-90(a) (repealed 1988).

<sup>468</sup> O.C.G.A. § 9-9-90(b) (repealed 1988). A failure on the part of the losing party to object to an award's lack of timeliness under this provision, however, was deemed to constitute a waiver of any right to urge this fact as a defense to confirmation. *See Diversified Ass'y, Inc. v. Ra-Lin & Associates*, 186 Ga. App. 904 (1988).

<sup>469</sup> O.C.G.A. § 9-9-91(a)(1)-(3) (repealed 1988).

In perhaps one of the most significant sections of the entire 1978 Georgia Construction Arbitration Code, the legislature also provided for substantive bases upon which an arbitral award could be refused enforcement by the court. These provisions reflected the influence of a variety of substantive bases for such action, including the defenses made available in the 1856 statute, the corresponding terms of the Federal Arbitration Act, and perhaps –one senses –a reading of the 1952 Uniform Arbitration Act as well:

(b) The award shall be vacated on the application of a party who either participated in the arbitration or was served with a demand for arbitration if the court finds that the rights of that party were prejudiced by:

- (1) Corruption, fraud, or misconduct in procuring the award;
- (2) Partiality of an arbitrator appointed as a neutral;
- (3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made;<sup>470</sup> or

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<sup>470</sup> In *Cotton States Mutual Insurance Company v. Nunnally Lumber Company*, 176 Ga. App. 232 (1985), a losing party urged as a basis for the vacation of an award the fact that the arbitrators did not provide written reasons for the result obtained in the proceeding. The Court of Appeals, recognizing that nothing in the 1978 Code required arbitrators to provide reasoned awards, refuted the notion that the absence of such written reasons would, *in ipso*, constitute “such imperfect execution of [the arbitrators’ authority] that a final and definite award upon the subject matter submitted was not made,” as provided in O.C.G.A. § 9-9-93(b)(1)-(3) (repealed 1988). The *ratio decidendi* of *Nunnally* was confirmed by the Georgia Court of Appeals in *Sayler Marine Corp. v. Dixie Metal Co.*, 194 Ga. App. 853 (1990), a case decided after the significant revisions to Georgia statutory arbitration law in 1988, revisions which did not, however, alter the language of the former O.C.G.A. § 9-9-93(b)(1)-(3) (repealed 1988). The 1988 Code is, of course, considered more fully, *infra*, as is the recent decision of the Georgia Court of Appeals in *Marchelletta v. Seay Construction Services, Inc.*, 2004 WL 26729, which adopts the rule of *Cotton States v. Nunnally* and confirms its position that written reasons need not accompany an award made under the current Georgia Arbitration Code.

(4) A failure to follow the procedure of this part [of the Georgia Code], unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.<sup>471</sup>

The 1978 Georgia Construction Arbitration Code further contemplated that, upon vacating an award, the court would have the authority to order a rehearing of the matter and a determination of all or any of the issues either before the same arbitrators or before new arbitrators appointed as provided in the code.<sup>472</sup> In addition, the court was vested with authority,

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<sup>471</sup> O.C.G.A. § 9-9-93(b)(1)-(4) (repealed 1988). Subsection ©) of this statute further provided that the award was to be vacated

on the application of a party who neither participated in the arbitration nor was served with a demand for arbitration if the court finds that:

- (1) The rights of the party were prejudiced by one of the grounds specified in subsection (b) of this code section;
- (2) A valid agreement to arbitrate was not made;
- (3) The agreement to arbitrate has not been complied with; or
- (4) The arbitrated claim was barred by limitation of time.

O.C.G.A. § 9-9-93©) (repealed 1988).

<sup>472</sup> O.C.G.A. § 9-9-93(d) (repealed 1988). This statute authorized trial courts to restrict the issues in any rehearing under this section to ones specified by the trial court in its order remanding the proceeding to the arbitrators. *See Mid-American Elevator Co. v. Gemco Elevator Co.*, 189 Ga. App. 143 (1988). The ability under the 1978 statute for an arbitral proceeding to move among the arbitral panel, the relevant and competent trial court, and the Georgia appellate courts partook of the nature of the English *case stated* practice whereby specific issues of law could be referred out of the arbitral proceeding by a party for a legal ruling by a court, to then be returned with judicial instructions to the arbitral panel. The *Mid-American Elevator Company* decision also determined that it would be prejudicial error for the trial court, in an order entered after a decision by the Court of Appeals, to require, in its order concerning the arbitral rehearing, that the arbitrators decide a contested issue before them solely on the basis of the existing record

analogous to that of arbitrators under O.C.G.A. § 9-9-91(a)(1)-(3) (repealed 1988), in that the court too could modify an award if it found that there had been a miscalculation of figures or a mistake in the description of any person, thing or property referenced in the award, or where the arbitrators purported to act upon a matter not submitted to them (at least under circumstances where the award could be corrected without affecting the merits of the decision upon the issues submitted), or under the circumstance where an award was imperfect in any manner of form, not affecting the merits of the controversy. As so modified, the award was to be confirmed by the court.<sup>473</sup>

The general principle adopted in the Georgia case law construing O.C.G.A. § 9-9-91(c) narrowly circumscribing the power of a court to change an award seems to have been that the court was strictly limited in its authority in the confirmation of an award to the terms of the award as rendered by the arbitrators or, possibly, as modified by the court independently on request of one of the parties: hence, trial courts tasked to confirm awards were strictly limited in their authority to do so, and could not use the confirmation procedure as a device to work –whether intentionally or unintentionally– a revision of the award. For instance, in *Thacker Construction Company v. A Betterway Rent-A-Car, Inc.*, decided in 1988 by the Georgia Court of Appeals, the arbitration panel had made an award against a joint venture, but had not made any findings of liability on the part of the constituent legal entities which made up that joint venture. In confirming the award, however, the trial judge entered judgment against the joint venture *and* the business organizations of which it was composed. The Court of Appeals found

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and without permitting the parties to submit additional evidence and arguments of law on the issues.

<sup>473</sup> O.C.G.A. § 9-9-94 (repealed 1988).

this to be error, drawing on an analogy between the finding of arbitrators in a panel and the verdict of a jury:

When a verdict is rendered by a jury, the judgment must conform to it. See Taylor v. Taylor, 212 Ga. 637, 638(1), 94 S.E.2d 744.

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An arbitration award is not unlike the verdict of a jury. See generally 6 C.J.S. 431, 432, Arbitration, § 163. Thus, if an award is confirmed the judgment must be entered in conformity with the award. See generally O.C.G.A. §§ 9-9-92; 9-9-95. Of course, an award can be modified; but a modification cannot be substantive, it cannot affect the merits of the case. See O.C.G.A. § 9-9-94. See also 6 C.J.S. 440, Arbitration, § 168.

By entering judgment against [the constituent entities of the joint venture] jointly and severally, the superior court, in effect, modified the arbitrators' award in a substantive way. It found facts which the arbitrators did not. See Harrell v. Bank of the South, 174 Ga. App. 384, 386, 330 S.E.2d 147, supra. This the superior court could not do. "If modification of the award in a matter of substance is required there must be a remission to the arbitrators." 6 C.J.S. 440, Arbitration, § 168. See also O.C.G.A. § 9-9-93(b)(3).<sup>474</sup>

Where the award was confirmed as submitted or as modified by the court, the code stipulated that judgment was then to be entered by the court on the award, the minute entry to

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<sup>474</sup> Thacker Construction Company v. A Betterway Rent-A-Car, Inc., 186 Ga. App. 660 (1988).



include the arbitral agreement, the award, a copy of any order confirming modifying or correcting the award, and a copy of the judgment.<sup>475</sup>

Under the provisions of O.C.G.A. § 9-9-97(a) (repealed 1988), the expenses and fees of the arbitrators, together with other expenses of the arbitral procedure incurred in the conduct of the arbitration, were to be paid as provided in the award.<sup>476</sup> This recovery, under the explicit terms of the statute, did not extend to the recovery of legal fees incurred as a result of the arbitral process. A line of Georgia authority stemming from O.C.G.A. § 13-6-11, an ancient “bad faith” standard which had worked its way into Georgia statutory law with the Cobb Code in 1863,<sup>477</sup>

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<sup>475</sup> O.C.G.A. § 9-9-95 (repealed 1988).

<sup>476</sup> The court retained the right, however, to reduce (or even disallow) fees and expenses which it found, on application of an aggrieved party, to be excessive. Presumably, a party to an arbitral proceeding unhappy with an award of arbitrator fees and expenses would have been authorized, under the terms of O.C.G.A. § 9-9-97(b) (repealed 1988), to seek a judicial review of the order based on this issue alone.

<sup>477</sup> The terms of that nineteenth century provision, still of force in Georgia law, state:

The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

O.C.G.A. § 13-6-11. For a discussion of a twentieth century legislative attempt in Georgia to update the provisions of this old statute, see E. R. Lanier, *Forward into the Past: Georgia's “New” Statutory Tort of Abusive Litigation*, 6 G.S.U. L. REV. 337 (1989). A decision of the Georgia Court of Appeals in March, 2004, determined that an award of attorney’s fees under O.C.G.A. § 13-6-11 by an arbitration panel convened in a claim against a security broker, a transaction in interstate commerce, would properly be vacated as arbitrary and capricious where the claimant failed to specially plead the statute as the basis for the award of such fees: because the terms of the statute itself require that it be “specially pleaded,” and that the claimant “[make] prayer therefor,” an award by the panel in the absence of such special pleading may be vacated under the nonstatutory ground authorized in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (1998). The court also expressed reservations as to whether an award under O.C.G.A. § 13-6-11 would be available in arbitral proceeding governed by federal law. *Joyner v. Raymond James Financial Services, Inc.*, 2004 WL 603912 (Ga. Ct. of

had seemed to indicate that its provisions would, in tandem with the Construction Arbitration Code, permit the recovery of such fees in an arbitral proceeding. The reasoning in *Jamison v. West*, a 1989 opinion of the Court of Appeals, seemed to stand for the proposition that, while attorneys fees were excluded from the scope of O.C.G.A. § 9-9-97(a), the provision in the 1863 Code was independent and could be applied within the context of the 1978 arbitration statute. This notion was put to rest in *Walton Acoustics, Inc. v. Currahee Construction Company*, a 1990 decision of the Georgia Court of Appeals:

O.C.G.A. § 9-9-97(a) provides: "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." In *Hughes & Peden, Inc. v. Budd Contracting Co.*, 193 Ga. App. 656, 388 S.E.2d 753 (1989), this court held that attorney fees are not recoverable in an arbitration action. Walton argues that attorney fees are recoverable under O.C.G.A. § 13-6-11. We disagree. O.C.G.A. § 9-9-97, enacted in 1978, controls over O.C.G.A. § 13-6-11 because it is the later expression of the legislature on the subject of attorney fees in this context. "The courts are to be guided by the last expression of the General Assembly on a subject." *Board of Trustees v. Christy*, 246 Ga. 553, 555, 272 S.E.2d 288 (1980). We do not find persuasive Walton's argument that *Jamison v. West*, 191 Ga. App. 431(4), 382 S.E.2d 170 (1989), stands for the proposition that attorney fees pursuant to O.C.G.A. § 13-6-11 may be recovered in an arbitration action, if

timely and properly pleaded. Rather, we hold that *Jamison* stands only for the proposition that expenses, but not attorney fees, may be recovered. We note specifically that the pertinent portion of O.C.G.A. § 9-9-97(a) allows recovery of "other expenses" incurred in the conduct of the arbitration.<sup>478</sup>

Thus, an expansive application of the terms of former O.C.G.A. § 9-9-97 in the Georgia courts<sup>479</sup> resulted in the rule that attorney's fees were not to be included in orders issued under the authority of that statute, regardless of the language of the underlying contract of the parties. While the cases on which this theory rests do not, on close examination, necessarily bear that reading, the potential that they did so invoked a ruling from the federal courts that if they were to be so construed, they would run counter to the provisions of the Federal Arbitration Act and would, hence, be preempted.

In proceedings under the Federal Arbitration Act, an arbitration award lawfully may include an award of attorneys fees if the underlying agreement between the parties so provides. *Ierna et al. v. Arthur Murray International, Inc., et al.*, 833 F.2d 1477, 1476 (CA 11, 1987). [The Georgia cases relied upon] are simply inapplicable to this case. The opinions in both of those cases purport to construe the Georgia Arbitration Act O.C.G.A. § 9-9-97. In [those] cases it appeared that there was no provision for an award of attorneys fees in the underlying agreement, and therefore the decisions themselves are not inconsistent with what

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<sup>478</sup> *Walton Acoustics, Inc. v. Currahee Construction Co. Inc.*, 197 Ga. App. 659, 399 S.E.2d 265 (1990).

<sup>479</sup> *See Hughes and Peden, Inc. v. Budd Contracting Company, Inc.*, 193 Ga. App. 656, 388 S.E.2d 753 (1989); *see also* *Walton Acoustics, Inc. v. Currahee Construction Co. Inc.*, 197 Ga. App. 659, 399 S.E.2d 265 (1990).

this court has stated above. Those cases, however, construed O.C.G.A. 9-9-97 [sic] to preclude the award of attorneys fees even if agreement therefor was included in an underlying agreement. ... While the question of what the initial clause of 9-9-97 modifies is certainly debatable, it is clearly within the competence of the Georgia appellate courts to settle that debate as to cases subject to the Georgia Arbitration Act. Once it is found ... that the underlying contract involves interstate or foreign commerce or a maritime transaction, the Federal Arbitration Act preempts the field. ... Whatever court or tribunal, state or federal, is applying the law must then resort to the Federal Arbitration Act and the body of Federal common law construing it. That is the case here.<sup>480</sup>

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<sup>480</sup> *Ceco Concrete Construction v. J. T. Schrimsher Construction Company*, 792 F. Supp. 109 (1992) (Citations omitted). It is doubtful whether Georgia law, properly construed, ever prohibited the enforcement of attorneys fees in arbitral proceedings under OCGA § 9-9-97 (repealed 1988) where the parties had agreed to such fees in their underlying contract, whatever the perceptions of the Federal District Court in *Ceco*. This issue, and the potential preemptive application of federal law which it might invoke, appear to have been resolved, however, in *Hope & Associates v. Marvin M. Black Company*, 205 Ga. App. 561 (1992), where the Georgia Court of Appeals held that “[t]his section [O.C.G.A. § 9-9-17, reenacting O.C.G.A. § 9-9-97] does not specifically prohibit the parties from contracting for the recovery of attorney’s fees in arbitration proceedings; it only addresses the allocation of the expenses of arbitration other than attorneys fees and provides that, as to the allocation of those expenses, the award will control insofar as it is not inconsistent with the parties’ agreement.” Equally ambiguous, however, is Judge Moye’s remark in *Schrimsher* that “[o]nce it is found ... that the underlying contract involves interstate or foreign commerce or a maritime transaction, the Federal Arbitration Act *preempts the field*,” if, by this observation, he means that state legislative jurisdiction is wholly displaced by federal law over any matter in interstate commerce. Such an assertion would be difficult to reconcile with the counsel of the United States Supreme Court in *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989): “[t]he FAA contains no express preemptive provision,” the court there reminds us, “nor does it reflect a congressional intent to occupy the entire field of arbitration.” *Volt*, 489 U.S. at 469. A fuller appraisal of the doctrine of federal preemption in the context of state arbitration law is included in this arbitral policy review, *infra*, in Chapter Three, Section 1, The Doctrine of Federal Preemption and the Autonomy of Georgia Arbitration Policy.

#### Section 4. The Georgia Arbitration Code of 1988

As the last decades in the twentieth century approached, effective Georgia arbitral policy encompassed not only a general common law matrix, codified and uncodified, but also the important 1856 statutory revisions to the common law, as well as the provisions of the 1978 Georgia Arbitration Code, a code thoroughly modern in its substantive content but narrowly limited to disputes within the construction industry. The Board of Governors of the State Bar of Georgia, in a statement in support of statutory revisions of arbitration law in Georgia, summarized both the challenge facing the state and its solution:

There exists an urgent need to modernize the arbitration law of Georgia, particularly in view of the enhanced role the state plays as a regional and international center for business. Georgia must join the other important commercial centers in the United States and abroad in making available the use of commercial arbitration for the settlement of the large variety of commercial disputes. Every effort must be made to prevent business from being discouraged from coming to Georgia or from going elsewhere as result of uncertainties in Georgia's arbitration law.

The present uncertainties in the law in Georgia should be eliminated by a statute, tailored to Georgia's special current and future requirements, and which will be consistent with the Federal Arbitration Act's interstate and international arbitration provisions, as well as being in harmony with the basic concepts of the Uniform Arbitration Act which has been adopted by a large majority of states. . . .<sup>481</sup>

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<sup>481</sup> As a consequence of these considerations, "[t]he Board endorse[d] the concept of a modern arbitration act for Georgia which will contain sound principles for the recognition and enforcement of arbitration agreements, submissions and awards for intrastate transactions and for international transactions and operations." *See A Resolution in Support of Amending Georgia's Commercial Arbitration Laws and Enacting an International Commercial Arbitration Statute* by the Board of Governors of the State the Bar of Georgia, January 8, 1986, reproduced in Memorandum, *Bar Sponsorship of Legislative Proposal to Amend Arbitration Statute*, from E. Wycliffe Orr, Sr., Chair of the Committee To Study Practicality of Mediation and Arbitration of the

The time was right<sup>482</sup> for a general revision of Georgia's fundamental statutory approach to formal and judicialized arbitration,<sup>483</sup> and this came with the adoption by the General

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State Bar of Georgia, to the Advisory Committee on Legislation of the State Bar of Georgia, dated October 23, 1986, in the possession of the author.

<sup>482</sup> An early version of a bill to substantially reform Georgia's's arbitration statutes had been approved by the Board of Governors of the State Bar of Georgia at the Annual Mid-year Meeting of the Bar on January 8, 1986, and a proposal based upon the Bar Association's recommendation had gone to the Georgia Senate during its spring, 1986 session. Although the Georgia Senate approved this bill as SB 540, it never became law. See Memorandum, *Bar Sponsorship of Legislative Proposal to Amend Arbitration Statute*, from E. Wycliffe Orr, Sr., Chair of the Committee To Study Practicality of Mediation and Arbitration of the State Bar of Georgia, to the Advisory Committee on Legislation of the State Bar of Georgia, dated October 23, 1986, in the possession of the author. A Senate attempt to enact the law the following year as SB 73 stalled in the House Judiciary Committee which delayed action, ostensibly for lack of adequate time to study the measure because of slowness by the Senate in reporting the proposal out. Barbara N. Berkman, *Will Be Held For Study: House Says No To Arbitration Bill*, FULTON COUNTY DAILY REPORT, March 6, 1987, at 1. As a consequence, measures were put in place to bring the matter before the legislature once again in its next session in 1988. S.B. 73 was reintroduced by Senator Nathan Deal, D-Gainesville, and it received its first, second, and third readings in the Georgia Senate on January 14, February 19, and February 20, 1987, respectively. It passed the Senate unanimously. In the Georgia House, it received its first reading on February 23, 1987; its second reading the next day, and its third reading on February 24<sup>t</sup>, 1987. After a series of spirited exchanges by supporters and opponents of the measure centering on issues such as protection of consumer rights, anxiety over the enforcement of contracts of adhesion, the arbitration of personal injury claims, and special notice provisions (*see*, "Proposed Amendments to S.B. 73, on Arbitration" ["as submitted by the State Bar drafting group"], dated January 25, 1988, and "Proposed Amendments to S.B. 73, on Arbitration," from "Professor Gabriel M. Wilner and Douglas Yarn of the Arbitration Bill Drafting Group," dated January 26, 1988, both in possession of the author), the bill was passed in the House by a vote of 136 in favor and 6 opposed. It was adopted by both houses on March 3, 1988, and became effective as law on April 5, 1988. See 1988 Ga. Laws, Vol. 1, 903 *et seq.*

<sup>483</sup> The widespread interest which appeared in the mid-1980s in modernizing Georgia's arbitration statutory framework is evidenced by the diverse interests represented by those who were the primary architects of the new statutory scheme. A Georgia State Bar Committee to Study the Practicality of Mediation and Arbitration, chaired by Mr. E. Wycliffe Orr, Sr., collaborated in this effort with the International Section of the State Bar of Georgia, then chaired by Mr. Judson H. Simmons, to frame the new law. On November 4, 1986, the Advisory Committee on Legislation of the State Bar of Georgia directed these bodies to continue in their work toward a consolidated draft of the proposed new legislation, based upon their earlier consensus achieved in early

Assembly in 1988 of a new Georgia Arbitration Code which displaced the bulk of the previous statutory structure and put in its place an advanced legislative scheme which still serves today as the foundation of Georgia's modern arbitration policy.<sup>484</sup>

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November, 1986, as to the structure of the new law:

The agreement [between the Georgia State Bar Committee to Study The Practicability of Mediation and Arbitration, together with the International Section of the State Bar of Georgia] in principal [sic] has four points.

First, the existing construction contract arbitration code is to be expanded to deal both with agreements to arbitrate all future disputes and submissions to arbitrate existing disputes. Except for specified exclusions, the new law will cover all disputes – not just those arising out of construction contracts. Second, the existing “Common Law Arbitration” and “Special Statutory Proceedings” provisions of the Georgia Code will be repealed because they are no longer needed. Third, internal inconsistencies in the existing construction arbitration code will be remedied. Fourth, a chapter dealing with the arbitration of international commercial disputes will be added.

Memorandum, *Comments on Proposed Georgia Arbitration Law*, from Philip L. Ray, Jr., to Members of the International Section, State Bar of Georgia, Drafting Committee for Amending Georgia's Arbitration Laws, dated November 7, 1986, in the possession of the author. The primary draftsmen of the new legislation included Mr. Philip L. Ray, Jr., an attorney now with Siemens A.G. in Erlangen, Germany; Professor Gabriel M. Wilner, at that time and still today a faculty member at the Lumpkin School of Law of the University of Georgia; and Mr. Douglas Hurt Yarn, then a staff attorney with the Southeastern Office of the American Arbitration Association and today a faculty member of the College of Law at Georgia State University.

<sup>484</sup> This code appears in codified form as Title 9 of the O.C.G.A., §§ 9-9-1 – 84, and consists of two articles. Article 1 (“General Provisions”) encompasses §§ 9-9-1 through 9-9-43, which in turn is subdivided into two Parts. The first of these (“Part 1,” including §§ 9-9-1 – 9-9-18) is given over to the “Arbitration Code,” which replaces the 1978 Construction Arbitration Code; Part 2 (“International Transactions,” §§ 9-9-30 – 9-9-43) was a new feature of the 1988 law, and is discussed in greater detail, *infra*, in this survey's Chapter Two, Section 5, “The Georgia International Transactions Arbitration Code.” Article 2 of Title 9 of the Code is given over to matters touching on arbitration of “Medical Malpractice” claims, and is based on the provisions of 1978 Ga. Laws, 2281 *et seq.* (now codified as O.C.G.A. §§ 9-9-6 – 9-9-84), and is not considered further here.

It is perhaps simplistic but not wholly inaccurate to describe the relationship of the 1988 Georgia Arbitration Code<sup>485</sup> and the 1978 Georgia Construction Arbitration Code<sup>486</sup> as basically an enlargement and extension of the fundamental policies of the latter into the former: a cursory review of its terms indicates that the later Georgia Arbitration Code represents an essential reworking of the earlier 1978 statute to extend the provisions of that earlier statute beyond the more narrow field of construction contracts and, with certain major innovations, make it broadly applicable to arbitrations in Georgia including those outside the strict confines of the construction industry.

It remains, however, a gross overstatement to say that the 1988 Code is little more the 1978 legislation with only a change in title. The 1988 legislation is, of course, broader in ambit and scope than that of 1978, applying to “all disputes in which the parties thereto have agreed in writing to arbitrate” and “provid[ing] the exclusive means by which agreements to arbitrate disputes can be enforced . . .”<sup>487</sup> Excepted from the broad reach of the 1988 Code were, however, the medical malpractice claims governed by Article 2 of the 1988 Georgia Arbitration

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<sup>485</sup> 1988 Ga. Laws, 903, § 1 *et seq.*

<sup>486</sup> 1978 Ga. Laws, 2270, § 1 *et seq.*

<sup>487</sup> O.C.G.A. § 9-9-2(c) (2001 Supp.). Since this provision repeals the common law, including common law rules regarding arbitration, it must be strictly construed. "The Georgia Arbitration Code 'shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate can be enforced.' [§OCGA 9-9-2(c).] By its enactment, the Arbitration Code repealed common law arbitration in its entirety, and it must, therefore, be strictly construed." *Greene v. Hundley*, 266 Ga. 592, 594(1), 468 S.E.2d 350 (1996)." *Aycock v. Re/Max of Georgia, Inc.*, 221 Ga. App. 587 (1996). Despite the policy evident in the code to enforce written arbitration agreements, the Georgia Court of Appeals ruled in March of 2004 that a contract provision simply noting that “there is a *voluntary* “Binding Arbitration Procedure” available to the parties to [the] Agreement” under the Georgia Arbitration Code, “*provided all parties to this Agreement concur in writing to abide by same,*” is not such an agreement in writing as will be enforced by the courts under O.C.G.A. § 9-9-2(c) (2001 Supp.). *Laird v. Risbergs*, 2004 WL 396438 (Ga. Ct. of Appeals) (emphasis in original).



Code<sup>488</sup>; collective bargaining agreements between employers and labor unions representing employees of such employers<sup>489</sup>; any contract of insurance (but not including arbitration clauses appearing in contracts between insurance companies)<sup>490</sup>; loan agreements or consumer financing agreements in which the amount of indebtedness is \$25,000 or less at the time of the agreement<sup>491</sup>; contracts for the purchase of consumer goods<sup>492</sup>; contracts involving consumer acts or practices or involving consumer transactions;<sup>493</sup> sales agreements or loan agreements for the purchase or financing of residential real estate, unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement<sup>494</sup>; contracts relating

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<sup>488</sup> O.C.G.A. § 9-9-60 (2001 Supp.); 1988 Ga. Laws, p. 903, § 1 *et seq.* See also O.C.G.A. § 9-9-2(c)(1) (2001 Supp.).

<sup>489</sup> O.C.G.A. § 9-9-2(c)(2) (2001 Supp.).

<sup>490</sup> O.C.G.A. § 9-9-2(c)(3) (2001 Supp.). See *McKnight v. Chicago Title Ins. Co.*, 2004 WL 178728, where the Federal Court of Appeals for the Eleventh Circuit sustained the application of this exception against the argument that it was preempted by the Federal Arbitration Act on the basis that such state laws were validated and made enforceable, despite their clear anti-arbitration intent and effect, by the provisions of the McCarran-Ferguson Act (15 U.S.C.A. § 1012[b]) permitting such provisions in state laws enacted for the purpose of regulating the business of insurance. To the same effect, see *Continental Ins. Co. v. Equity Residential Props. Trust*, 255 Ga. App. 445 (2002), cited by the Eleventh Circuit in *McKnight*, at 3.

<sup>491</sup> O.C.G.A. § 9-9-2 (c)(5) (2001 Supp.).

<sup>492</sup> O.C.G.A. § 9-9-2 (c)(6) (2001 Supp.).

<sup>493</sup> O.C.G.A. § 9-9-2 (c)(7) (2001 Supp.). See *Pate v. Melvin Williams Manufactured Homes, Inc.*, 198 L.R. 841, 845 (1996), determining this section to be preempted by the pro-arbitration policy of the Federal Arbitration Act if the consumer transaction in issue is one “affecting interstate commerce.”

<sup>494</sup> O.C.G.A. § 9-9-2 (c)(8) (2001 Supp.). In the decision of the Georgia Court of Appeals in *Haynes v. Fincher*, 241 Ga. App. 179 (1999), the court sustained the enforceability of an arbitration clause in a contractor’s warranty agreement which was contained in a booklet attached to the contract. The court reasoned that the warranty contract was neither a sales agreement nor a loan agreement with respect to the purchase or financing of residential real estate and therefore not within the ambit of O.C.G.A. § 9-9-2(c)(8) (2001 Supp.).

The [defendants’] attempt to avoid their agreement to be bound by the warranty’s arbitration provision is unpersuasive. It is

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undisputed that the [defendants] applied for the warranty; the face of their application plainly states that the warranty consists of the application and the warranty program booklet, and that by signing the application they acknowledge having read the warranty booklet; the booklet clearly provides that disputes may be resolved by binding arbitration under the Federal Arbitration Act; the [defendants] sought the benefit of such dispute resolution by requesting arbitration pursuant to the warranty program; they participated in the arbitration which they had started; and they obtained a final arbitration award that they did not challenge under the arbitration appeal procedures.

Based on these facts, there is no question that the [defendants] agreed to ... the warranty program's binding arbitration provision. And contrary to the [defendants'] arguments, such an agreement is valid and enforceable.

Haynes v. Fincher, 241 Ga. App. 179 (1999), at 180. *See also* Pinnacle Construction Co. v. Osborne, 218 Ga. App. 366 (1995) and Goodrich v. Southland Homes Corp., 214 Ga. App. 790 (1994), both sustaining the application of O.C.G.A. § 9-9-2(c)(8) (2001 Supp.) to void arbitration clauses. *Cf.* Laird v. Risbergs, 2004 WL 396438 (Ga. Ct. of Appeals), where the Georgia Court of Appeals held in March, 2004, that clauses in a home construction and purchase agreement and associated warranty could not be enforced against the purchasers where, among other reasons, they had not initialed the relevant provisions in the documentation of the sale. Special notice requirements respecting arbitral clauses in contracts not unlike those called for in O.C.G.A. § 9-9-2(c)(8) (2001 Supp.) were the object of the U. S. Supreme Court's critical analysis under the Federal Arbitration Act in its opinion in Doctor's Associates, Inc. v. Casarotta, 517 U.S. 681 (1996), considered, *infra*, in this survey's Chapter Three, Section 1, *Continuing Debate: The Scope of the Federal Arbitration Act and Its Displacement of State Law*. The Southeastern Regional Office of the American Arbitration Association, at the time of the adoption of the 1988 Georgia Arbitration Code, expressed some reservation regarding the enforceability of special notice requirements such as those found in O.C.G.A. § 9-9-2(c)(8) (2001 Supp.), noting that "... such exceptions would only be applicable in purely intra-state transactions. State-created exceptions to the enforceability of arbitration are not permitted under federal law and policy, which is applicable when the transaction merely 'involves' interstate, foreign, or maritime commerce." Press Release, "The Georgia Arbitration Code," transmitted to Rhys Wilson by the Southeastern Regional Office of the American Arbitration Association under letter dated March 28, 1988, a copy of which is in the possession of the author. Where the Federal Arbitration Act controls, the Georgia Court of Appeals has since held, the special signature requirements of O.C.G.A. § 9-9-2(c)(9) (2001 Supp.) are in fact—even as the AAA predicted—preempted by the federal law. *See* Primerica Financial Services, Inc. v. Wise, 217 Ga.

to employment, except where the clause agreeing to arbitration in that connection is initiated by all signatories at the time of the execution of the agreement<sup>495</sup>; and all agreements to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort.<sup>496</sup>

The statutorily defined effect of an arbitration agreement as set forth under the 1988 legislation<sup>497</sup> is virtually identical to the analogous provision of the 1978 Construction

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App. 36, 40-41 (1995).

<sup>495</sup> O.C.G.A. § 9-9-2(c)(9) (2001 Supp.). *See* Primerica Financial Services, Inc. v. Wise, 217 Ga. App. 36, 40-41 (1995), discussed *supra*, holding this provision preempted by the FAA in an interstate transaction. *But see*, more recently, ISS Intern. Service Systems v. Widmer, 264 Ga. App. 55 (2003), applying O.C.G.A. § 9-9-2(c)(9) (2001 Supp.) without any apparent concern for federal preemption in a case centering, in part, on the transfer of a corporate employee from New York to Georgia. *See also* Doman v. Stapleton, 256 Ga. App. 383 (2002), where the Georgia Court of Appeals took no issue with an arbitrator's decision that O.C.G.A. § 9-9-2(c)(9) (2001 Supp.) was inapplicable to the attorney-client relationship; and Columbus Anesthesia Group, P.C. v. Kutzner, 218 Ga. App. 51 (1995), deciding against federal preemption of O.C.G.A. § 9-9-2(c)(9) (2001 Supp.), even though the employment contract in that case entailed the transfer of a physician from Indiana to Georgia. The result in *Kutzner* is drawn into question by the broad scope given to the definition of interstate commerce by the United States Supreme Court in its subsequent decision in the case of *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). Interesting too, for comparative purposes, is the decision of the South Carolina Court of Appeals in *James C. Thornton, M.D. v. Trident Medical Center, L.L.C.*, 357 S.C. 91 (2003) (S.C. App.), which, on facts almost identical to those in *Kutzner*, reached a diametrically opposite decision.

<sup>496</sup> O.C.G.A. § 9-9-2(c)(10) (2001 Supp.).

<sup>497</sup> O.C.G.A. § 9-9-3 (2001 Supp.). In the absence of a valid agreement to arbitrate, of course, the Georgia courts will not compel a party to do so. *See* Leigan v. Sears Roebuck & Co., 248 Ga. App. 145 (2001). While O.C.G.A. § 9-9-3 (2001 Supp.) advances the long-standing policy of the state that arbitration agreements are to be enforceable, it does not go so far as to create an amorphous presumption that parties have some sort of obligation to so agree. It is not, therefore, indicia of bad faith or stubborn litigiousness to refuse to refer a pending dispute to arbitration where there is not otherwise an agreement to do so. In *Witty v. McNeal Agency, Inc.*, 239 Ga. App. 554 (1999), the plaintiffs argued that the trial court erred in excluding evidence in the proceeding below that they had asked defendants to submit to expedited arbitration. Plaintiffs then argued in court that defendants' refusal constituted evidence of stubborn litigiousness on plaintiffs' claim, seeking an award of attorney's fees on that basis under O.C.G.A. § 13-6-11, discussed *supra*. "Absent a mandatory arbitration clause in a contract," said the court:

Arbitration Code,<sup>498</sup> with the exception that agreements to arbitrate both existing and future disputes in the 1988 legislation were declared enforceable *without regard to the justiciable character of the controversy*, this language being absent from the earlier statute. As reiterated in the 1988 legislation, then, the general policy of the State of Georgia regarding the effect of an arbitration agreement is declared to be that:

[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit any controversy thereafter arising to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.<sup>499</sup>

The provisions of the 1988 Georgia Arbitration Code regarding venue, service of papers, and scope of the court's consideration,<sup>500</sup> reiterated fundamentally the analogous provisions of

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refusal to arbitrate is not, in itself, stubborn litigiousness, because arbitration is only one of the alternative dispute resolution procedures to avoid trial and to resolve a controversy. Unless made mandatory by state or federal law, arbitration is voluntary by agreement of all parties. See §§OCGA 9-9-2; 9-9-6; 9-9-32; 9-9-61. If refusal to do an act that is a voluntary exercise of rights constitutes stubborn litigiousness, then arbitration no longer would be voluntary. Thus, stubborn litigiousness is not the failure to follow a procedure or the following of a particular procedure in seeking to resolve a legal dispute.

Witty v. McNeal Agency, Inc., 239 Ga. App. 554, 555 (1999).

<sup>498</sup> O.C.G.A. § 9-9-82 (2001 Supp.).

<sup>499</sup> O.C.G.A. § 9-9-3 (2001 Supp.).

<sup>500</sup> O.C.G.A. § 9-9-4 (2001 Supp.). Subsection (d) of this statute ("In determining any matter arising under this part, the court shall not consider whether the claim with respect to which arbitration is sought is tenable nor otherwise pass upon the merits of the dispute."), in tandem with the provisions of subsection (e) ("The superior court ... may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitral controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."), have been construed to authorize the court to pass on issues of arbitrability, to

the 1978 statute, except that an additional provision as to venue was provided in the later statute, essentially establishing a default venue for those cases where no specific venue provision of the statute resolved this fundamental issue; in such a case, venue was to be *in any court*.<sup>501</sup> More importantly, the 1988 legislation filled a significant gap in authorizing the appropriate superior court to “entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitral controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.”<sup>502</sup> This legislative directive with respect to provisional relief had no counterpart in the earlier Georgia Construction Arbitration Code or in the case law decided under it.<sup>503</sup>

The terms of the 1988 legislation pertaining to the bar of the statute of limitations in application to arbitral proceedings<sup>504</sup> was not remarkably different from that established in the earlier statute,<sup>505</sup> except that the new statute made explicit the fact that “the court has discretion

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the exclusion of the arbitral panel. *See BellSouth Corporation v. Forsee*, 2004 WL 170145 (Ga. Ct. of Appeals). *Cf.*, however, O.C.G.A. § 9-9-34 (2001 Supp.), the section of the Georgia International Transactions Arbitration Code treating the independence of the arbitration clause, and providing that “the arbitrators may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.” This latter statutory provision has not as yet been construed by any Georgia appellate court.

<sup>501</sup> O.C.G.A. § 9-9-4(b)(4) (2001 Supp.).

<sup>502</sup> O.C.G.A. § 9-9-4(e) (2001 Supp.).

<sup>503</sup> In addition, the terms of the 1978 law respecting the validity of arbitral agreements, and conditioning the validity of the arbitration agreement on the incorporation by the parties of an approved method of selecting arbitrators, was deleted from the 1988 legislation. O.C.G.A. § 9-9-83 (2001 Supp.).

<sup>504</sup> O.C.G.A. § 9-9-5 (2001 Supp.).

<sup>505</sup> O.C.G.A. § 9-9-85 (2001 Supp.).

in deciding whether to apply the bar [of the statute of limitation].<sup>506</sup> Moreover, the 1988 legislation made clear that “a party waives the right to raise limitation of time as a bar to arbitration in an application to stay arbitration by that party’s participation in the arbitration.”<sup>507</sup>

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<sup>506</sup> O.C.G.A. § 9-9-5(a) (2001 Supp.).

<sup>507</sup> *Id.* This rule is, of course, a specific application of the broader principle of waiver respecting the contractual right to arbitrate as it exists under modern Georgia law. In *Burnham v. Cooney*, 2004 WL 78152 –where the parties had extensively litigated an attorney’s fee contract before the defendant in the litigation raised the potential bar of a mandatory arbitration agreement– the Georgia Court of Appeals rehearsed the general principles of waiver as these apply to the enforcement of arbitration agreements in Georgia law:

“The purpose of arbitration is to avoid the courts for dispute resolution. ... [A]rbitration parties agree to waive certain ... rights in favor of a quick resolution of their dispute by extralegal means.” “An agreement to arbitrate is waived by any action of a party which is inconsistent with the right of arbitration.” [Cits.]” In *Wise v. Tidal Constr. Co.*, the defendant raised the issue of mandatory arbitration in its answer but then proceeded to conduct discovery and move for summary judgment. Finding the latter actions “grossly inconsistent with the inherent purpose for arbitration,” we held that the defendant had thereby waived a mandatory arbitration clause. Accordingly, we later held in *Phil Wooden Homes v. Ladwig* that the defendants had waived their right to mandatory arbitration by filing a counterclaim and obtaining discovery before raising the issue of arbitration.

Here, [the defendant] *Burnham* pled to the merits of the case, responded to discovery, and obtained a transfer of the case from Richmond County to Houston County before asserting the mandatory arbitration clause years after suit was filed. The superior court was authorized to find that he thereby waived his right to a quicker resolution of the dispute in arbitration. ... The court in which this case was originally filed had authority to compel arbitration.

*Burnham v. Cooney*, 2004 WL 78152 (2004) (Ga. Ct. Of Appeals), at 1-2 (footnotes omitted). *See also* *Phil Wooden Homes, Inc. v. Ladwig*, 262 Ga. App. 792 (2003) and *Wise v. Tidal Constr. Co.*, 261 Ga. App. 670 (2003).

The basic principles of the 1978 legislation regarding the application to compel or stay arbitration<sup>508</sup> were carried forward to the new statute. Moreover, the new legislation<sup>509</sup> provided that:

If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.<sup>510</sup>

Furthermore, the new legislation also stipulated specific defenses to a motion to compel arbitration, including the grounds (available as well as the basis for a motion to stay arbitration)

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<sup>508</sup> O.C.G.A. § 9-9-86 (2001 Supp.).

<sup>509</sup> O.C.G.A. § 9-9-6(a) (2001 Supp.). The Georgia Arbitration Code does not appear to have explicit language, as does § 3 of the Federal Arbitration Act, empowering the court to stay pending litigation independent of the effect of an order compelling arbitration. *See Yeremian v. Ellis*, 239 Ga. App. 805 (1999), holding that an application to compel arbitration operates merely to stay further proceedings in an action when entered by the same court in which the action is pending. Georgia courts have, in addition, apparently appropriated to themselves the authority to issue orders staying litigation, reasoning that, while a motion for summary judgment under O.C.G.A. § 9-11-56 would be an inappropriate device to employ where a plaintiff has filed suit in violation of an arbitration agreement since it is designed to adjudicate a matter summarily on its merits, nonetheless “the defendant who is aggrieved by the refusal of a plaintiff to arbitrate is to apply to the court for a stay of proceedings pending arbitration.” *Tillman Group, Inc. v. Keith*, 201 Ga. App. 680 (1991). Presumably such a motion to stay litigation proceedings would be joined with a motion to compel arbitration under O.C.G.A. § 9-9-6(a) (2001 Supp.). The relationship of the permissive motion to stay litigation pending arbitration, seemingly endorsed in the *Tillman Group* decision, to the traditional standard in Georgia exemplified by the terms of § 9-5-3 (2001 Supp.) (“Equity will not enjoin the proceedings and processes of a court of law, absent some intervening equity or other proper defense of which a party, without fault on his part, cannot avail himself at law.”) is unclear.

<sup>510</sup> *Id.*

that “no valid agreement to submit to arbitration was made; ... the agreement to arbitrate was not complied with; or ... the arbitration is barred by limitation of time.”<sup>511</sup>

New in the 1988 Arbitration Code were its provisions regarding the consolidation of arbitral proceedings:

Unless otherwise provided in the arbitration agreement, a party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:

- (1) Separate arbitration agreements or proceedings exist between the same parties or one party is a party to a separate arbitration agreement or proceeding with a third party;
- (2) The disputes arise from the same transactions or series of related transactions or series of related transactions; and
- (3) There is a common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.<sup>512</sup>

In addition, the new statute provided with respect to the formation of the arbitral tribunal in cases of consolidation, that:

If all the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation ..., shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the

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<sup>511</sup> O.C.G.A. § 9-9-6(b) (2001 Supp.).

<sup>512</sup> O.C.G.A. § 9-9-6(e)(1)-(3) (2001 Supp.). This section is drawn from the essentially identical language appearing in Section 1281.3 (West 1982) of the California Civil Procedure Code, adopted by the California legislature in 1978.



parties. If the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consolidation ... shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator.<sup>513</sup>

Needed flexibility was afforded in the 1988 Code's stipulations that the court had the power to resolve any inconsistency in parallel arbitral agreements, to resolve any such conflicts, and to determine the rights and duties of the various parties; in addition, the statute makes clear the power of the court to exercise its discretion to deny consolidation of separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings.<sup>514</sup>

The stipulations of the 1978 statute regarding the appointment of arbitrators was brought forward into the 1988 legislation, with the seemingly significant exception that language of the older statute requiring that potential arbitrators have general knowledge and experience as to the type of dispute or controversy to be arbitrated was deleted from the new legislation.<sup>515</sup>

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<sup>513</sup> O.C.G.A. § 9-9-6(f) (2001 Supp.). *Cf.* Section 1281.3, California Civil Procedure Code (West 1982).

<sup>514</sup> O.C.G.A. § 9-9-6(g)(h) (2001 Supp.). *Cf.* Section 1281.3, California Civil Procedure Code (West 1982). On the special procedural problems present in complex, multiparty arbitration proceedings, *see generally* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 653-700 (2001), and the works therein cited at 653.

<sup>515</sup> O.C.G.A. § 9-9-7 (2001 Supp.). The belief was, apparently, that considerations of party autonomy dictated that the qualifications of the arbitrators be left entirely to the judgment and discretion of the parties.

Provisions of the old legislation regarding the procedural due process rights of parties to an arbitral proceeding<sup>516</sup> were fundamentally carried forward into the new legislation,<sup>517</sup> except that the older statute's provisions regarding the necessity of an arbitrator's oath were deleted and, in addition, the arbitrators' former discretion to ignore the agreement of the parties as to the county in which the arbitration hearing is to be held<sup>518</sup> was stricken and does not appear in the new law.

The arbitrator's powers to issue and enforce subpoenas and discovery orders as provided in the 1978 legislation<sup>519</sup> were brought forward virtually intact into the new 1988 Georgia

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<sup>516</sup> O.C.G.A. § 9-9-88 (2001 Supp.).

<sup>517</sup> O.C.G.A. § 9-9-8(b)-(e) (2001 Supp.). These rights relating to basic procedural protections of the parties are quite important, of course, and include the right to be heard; to present pleadings, documents, testimony, and other matters; and to cross-examine witnesses. In addition, parties have the right to be represented by an attorney; and the right to the active participation of all of the arbitrators. Until March of 2004, the requirement of O.C.G.A. § 9-9-8(e) (2001 Supp.) that “[t]he arbitrators shall maintain a record of all pleadings, documents, testimony, and other matters introduced at the hearing,” had evaded judicial construction. However, in *Brown v. Premiere Designs, Inc.*, 2004 WL 434239 (Ga. Ct. of Appeals), it was determined that the requirements of this code section were subject to the provisions of O.C.G.A. § 9-9-8(f) (2001 Supp.), permitting a waiver by the parties of the general requirement that arbitrators maintain records of their proceedings. Since the claimant and respondent in that case had, prior to the initiation of arbitral proceedings, agreed to dispense with a written record of the arbitration hearing and because they had, in addition, continued with the proceeding in the knowledge that no record was being made, they effectively waived the procedural requirement of a written record. *See Brown v. Premiere Designs, Inc.*, at 1.

<sup>518</sup> O.C.G.A. § 9-9-88(b) (2001 Supp.).

<sup>519</sup> O.C.G.A. § 9-9-89 (2001 Supp.).

Arbitration Code.<sup>520</sup> Similarly, the prior legislation's requirement that the arbitral award be in writing and that copies thereof be furnished to the parties was perpetuated in the 1988 statute.<sup>521</sup>

The authority of arbitrators to modify an award on the grounds that there was a miscalculation of figures or a mistake in the description of any person, thing, or property referred to in the award; or that the arbitrators made an award *ultra vires* on a matter not submitted to them; or on the basis that the award was imperfect in matter of form not affecting the merits of the controversy, were all features retained virtually intact in the new 1988 Georgia Arbitration Code.<sup>522</sup>

Particularly important was the fact that the authority for a vacatur of an arbitration award by the court and the grounds therefore as stipulated in the Georgia Construction Arbitration Code were brought forward into the 1988 Georgia Arbitration Code almost without change.<sup>523</sup>

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<sup>520</sup> O.C.G.A. § 9-9-9 (2001 Supp.).

<sup>521</sup> O.C.G.A. § 9-9-10 (2001 Supp.). Writing in *Marchelletta v. Seay Construction Services, Inc.*, 2004 WL 26729, the Georgia Court of Appeals, quoting *Cotton States Mutual Ins. Co. v. Nunnally Lumber Co.*, 176 Ga. App. 232 (1985), at 234, noted that subsection (a) of this provision has been interpreted to exclude any requirement for reasoned awards: "OCGA § 9-9-90 (a) [the statutory predecessor of O.C.G.A. § 9-9-10(a)] provides in part that, '[t]he award shall be in writing and signed by the arbitrators joining in the award.' *There is no mandate that the award include specific findings or reasons, or that it expressly address each and every issue and collateral issue arising in an arbitration.*' (Emphasis supplied.)"

<sup>522</sup> O.C.G.A. § 9-9-11 (2001 Supp.).

<sup>523</sup> O.C.G.A. § 9-9-13 (2001 Supp.). This section of the 1988 Georgia Arbitration Code was construed by the Court of Appeals in *Atlanta Gas Light Company v. Trinity Christian Methodist Episcopal Church*, 231 Ga. App. 617 (1998), at 619-620, so as to provide substantial leeway to an arbitrator in framing an award:

"The authority of the arbitrator gives [him] the inherent power to fashion a remedy as long as the award draws its essence from the contract or statute." . . . The Code does not require that an arbitrator enter written findings of fact and law in support of an award, "nor does the Code

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require an arbitrator to explain the reasoning behind an award." . . . Simply because the umpire in the instant case provided a limited rationale for his holdings does not provide a vehicle whereby the awards may be vacated because Georgia law was allegedly "imperfectly" applied. "[M]erely because the relief granted in the arbitration award could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm an award." . . . In the instant case, the umpire made "final and definite award[s] upon the subject matter submitted," as required by statute. §OCGA 9-9-13(b)(3). As the awards are consistent with the terms of the Agreement and thus reflect the "essence" of the contract, they do not demonstrate an imperfect execution of the umpire's authority.

Georgia case law sometimes evidences somewhat disturbing tendencies to use the ambiguity and vagueness of the statutory bases for judicial vacation of awards provided in O.C.G.A. § 9-9-13(b)(1)-(3) (2001 Supp.), especially that which provides that an award may be vacated if it has been demonstrated that it represents "[a]n overstepping by the arbitrators of their authority or such imperfect execution of them that a final and definite award upon the subject matter submitted was not made..." as a means of evading the limitations on judicial review of arbitral awards. In the recent decision of the Georgia Court of Appeals in *Sweatt v. International Development Corp.*, 242 Ga. App. 753, 755 (2000), the court correctly noted that

[d]uring arbitration proceedings, the general rules of contract construction apply. *Martin v. RocCorp, Inc.*, 212 Ga. App. 177 ... (1994). An arbitration award should be consistent with terms of the underlying agreement and reflect the 'essence' of that contract; it must not demonstrate 'imperfect execution' of the arbitrators authority. ... Although the arbitrator has some latitude in fashioning remedies, he is not free to ignore the express terms of a valid and enforceable contract...

Relying on this principle, however, the court chose to vacate an award in a construction dispute which granted actual damages where the contract between the parties had stipulated liquidated damages in the event of a dispute. The *ratio decidendi* of the court stressed that the award of actual damages instead of the contractually agreed-upon liquidated damages was an "overstepping" of authority under the submission and an "imperfect execution" of his charge by the arbitrator sufficient to justify the vacation (and, in this case, modification under the provisions of O.C.G.A. § 9-9-14[b][1]-[3]) (2001 Supp.) of the award by the court as a matter of law. The gravamen of the *Sweatt* decision touches, of course, on the related issue of the availability of the arbitrator's manifest disregard of law as a basis for the vacatur of an arbitral award, an issue considered at more length, *infra*, in this Chapter's discussion, in its Section 6, of the 2003 amendment to the 1988 Georgia Arbitration Code adopting "manifest disregard of law"

The permissible period in which to make application for a modification of an award by the court, however, was changed from the thirty days allowed under the 1978 legislation,<sup>524</sup> and enlarged in the new act to a period of three months after the delivery of a copy of the award to the applicant.<sup>525</sup> The remaining bases for the modification of an award, however, were left intact.<sup>526</sup> Moreover, the obligation of the court to confirm an award which it has modified was reiterated in the new statute.<sup>527</sup> The new law's provisions for the entry of judgment on the award after its confirmation are identical to that contained in the older legislation.<sup>528</sup>

The language of the 1978 law regarding the finality of a judgment or order entered under the Georgia Arbitration Code for appeal purposes was continued under the 1988 legislation,<sup>529</sup> as were the earlier provisions of the 1978 law<sup>530</sup> regarding the award of arbitrators' fees and expenses.<sup>531</sup> Significant, however, was the absence

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as a permitted grounds for the vacatur of an arbitral award.

<sup>524</sup> O.C.G.A. § 9-9-94 (2001 Supp.).

<sup>525</sup> O.C.G.A. § 9-9-14(a) (2001 Supp.).

<sup>526</sup> O.C.G.A. § 9-9-14(b)(1)-(3) (2001 Supp.).

<sup>527</sup> O.C.G.A. § 9-9-14©) (2001 Supp.).

<sup>528</sup> O.C.G.A. § 9-9-15 (2001 Supp.).

<sup>529</sup> O.C.G.A. § 9-9-16 (2001 Supp.).

<sup>530</sup> Significantly, this provision carried forward the general statutory prohibition of an award of attorneys' fees. "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." O.C.G.A. § 9-9-97 (repealed 1988).

<sup>531</sup> O.C.G.A. § 9-9-17 (2001 Supp.). A decision of the Georgia Court of Appeals has considerably expanded this section, however. While conceding that the statute does not authorize the recovery of fees in the absence of an agreement allowing their recovery, the court has found that such an agreement can be evidenced explicitly by the conduct of the parties. In *Akintobi v. Phoenix Fire Restoration Company, Inc.*, 239 Ga. App. 760 (1999), the respondent "Akintobi's sole enumeration of error [was] that the trial court

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erred in confirming the arbitration award because neither the written contract nor the parties' arbitration agreement expressly provided for the recovery of attorney fees." The court nonetheless found that the arbitrator's award granting such fees was proper under the circumstances of this case:

O.C.G.A. § 9-9-13(b) sets forth the exclusive grounds upon which an arbitration award may be vacated. *Greene v. Hundley*, 266 Ga. 592, 595-596(3), 468 S.E.2d 350 (1996). The Georgia Arbitration Code requires a trial court to confirm an award upon timely application by a party, *unless one of the statutory grounds for vacating or modifying the award is established*. *Haddon v. Shaheen & Co.*, 231 Ga. App. 596-597(1), 499 S.E.2d 693 (1998). "[T]he power of a court to vacate an arbitration award has been severely limited in order not to frustrate the legislative purpose of avoiding litigation by resort to arbitration." (*Emphasis in original.*) *Id.*

Here, nothing on the face of the arbitration award including the award of attorney fees appears to be the result of corruption, fraud, or misconduct. *Greene*, 266 Ga. at 596, 468 S.E.2d 350. Nor does the award evince any partiality or overstepping by the arbitrator. *Gilbert v. Montlick*, 232 Ga. App. 91, 93(2), 499 S.E.2d 731 (1998). In fact, although no contract provided for attorney fees, the record demonstrates that both sides vigorously pursued such fees before the arbitrator. Not only did Akintobi fail to object to the evidence of Phoenix's attorney fees at arbitration, Akintobi submitted its own evidence of attorney fees. In so doing, Phoenix and Akintobi implicitly agreed to arbitrate that issue. See *Hope & Assoc. v. Marvin M. Black Co.*, 205 Ga. App. 561, 562(1), 422 S.E.2d 918 (1992). Inasmuch as Akintobi failed to sustain its burden of showing that the arbitrator's decision was "completely irrational" or constituted a "manifest disregard of the law," it must be upheld. *Amerispec Franchise v. Cross*, 215 Ga. App. 669, 671(1), 452 S.E.2d 188 (1994); § O.C.G.A. 9-9-13(b).

*Akintobi v. Phoenix Fire Restoration Company, Inc.*, at 761. The "manifest disregard of law" as a foundation for the vacatur of an arbitral award under modern Georgia law is discussed more fully, *infra*. Further, the Georgia Court of Appeals has now explicitly recognized that independent claims to attorney fees arising from statutory authorizations for the award of such fees, such as the Prompt Pay Act, O.C.G.A. § 13-11-1, may be arbitrated if the parties so agree. See *Yates Paving & Grading Co. v. Bryan County*, 2004 WL 253734 (Ga. Ct. of Appeals). See also *Hope & Assocs. v. Marvin M. Black Co.*, 205 Ga. App. 561 (1992), discussed *supra*, approving an award of attorney fees in arbitration proceedings based on an independent agreement of the parties for such an

from the new 1988 Arbitration Code of the stipulations appearing in the 1978 legislation permitting the court to reduce or disallow any fees or expenses found to be excessive, and the power of the court to allocate them “as justice requires.”<sup>532</sup>

## Section 5. The Georgia International Transactions Arbitration Code of 1988

The enactment of Georgia’s 1978 Construction Arbitration Code was a clear signal that the nineteenth century underpinnings of the state’s arbitral system was inadequate; the inadequacy of the common-law base of that antiquated system –even though reinforced by the provisions of the 1856 arbitration statute– was hardly remedied, however, by the arbitration code legislatively enacted in 1978. Much remained yet to be done at that point in time in order to provide Georgia with a functioning, efficient, modern and comprehensive statutory foundation for the conduct of alternative dispute resolution procedures generally, and arbitral measures in particular. Especially in the fields of international relations and international commerce and trade, Georgia’s arbitral infrastructure was woefully lacking as the state lurched toward the end of the twentieth century.<sup>533</sup>

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award and construing the provisions of O.C.G.A. § 9-9-17 to permit such an award. *But see* Joyner v. Raymond James Financial Services, Inc., 2004 WL 603912 (Ga. Ct. of Appeals), requiring strict compliance with the special pleading requirements of O.C.G.A. § 13-11-1 in order to put into issue any fees under that statute.

<sup>532</sup> *See* O.C.G.A. § 9-9-97(b) (2001 Supp.).

<sup>533</sup> Beyond the patent general need for a modern arbitration code responsive to current trends and requirements, special concerns in the international arena centered on the utility of arbitration legislation addressing unique considerations in developing countries which were increasingly recognized as markets for Georgia-based goods and services. On the concerns and interests of developing nations in this regard, *see generally* Gabriel M.

Long occupying a position of preeminence in cultural, economic and commercial matters throughout the Southeast, Georgia (and especially its capital city, Atlanta) began in the second half of the twentieth century to assume a position of natural leadership with respect to international contacts and relationships as well. Writing in 1982, Dr. Delwin A. Roy, then Director of The Georgia World Congress Institute, an international trade research center in Atlanta, observed:

One of the measures of “internationalization” [in Georgia] is the *degree* to which foreigners are in evidence in business, economic and political affairs of the city [of Atlanta]. Atlanta recently has felt increasing foreign presence in the areas in banking, direct investments and consular trade offices. As a regional center, Atlanta always has been viewed as an appropriate host for representatives of foreign governments. Consular and trade offices have been long-standing symbols of the international significance of our city. And, with more and more foreign governments establishing offices here, this will continue to be a significant factor in the future internationalization of Atlanta.

The opening of representative offices of foreign banks is even more dramatic evidence of our growth in that direction. At present, ten such banks have been established in the city, most opening only recently as a result of the state’s new liberalized banking laws. The increasing number of foreign bank offices can be construed as evidence of the increasing importance the South may have for their

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Wilner, *Acceptance of Arbitration in Developing Countries*, in *RESOLVING DISPUTES THROUGH INTERNATIONAL ARBITRATION* 283, 283-291 (Thomas E. Carbonneau, ed. 1984).



clients – the large multi-nationals of such countries as England, France, Japan, Germany and the Netherlands.<sup>534</sup> As late as 1974, Georgia had been the host to a mere thirty-six discrete instances of foreign direct investment, but by the end of the 1970s, the state had become home to 375 such investments; this number was to rise dramatically to 550 such investments (with a value of almost \$2 billion) within the first twelve months of 1981. This dramatic increase in the number and volume of foreign direct investments in the state may be attributed to “its abundance of natural resources, a labor force adequate both in terms of numbers and skills to accommodate virtually any proposed investment, and an active and aggressive policy on the part of the state government to attract the foreign investor.”<sup>535</sup> The modernization of the state’s seaport facilities in Brunswick and Savannah, complemented by the dramatic growth of the air transportation system centered in Atlanta, as well as the elaboration of a modern and efficient road system throughout the state, all contributed to the attractiveness of the city of Atlanta and the State of Georgia as magnets for foreign trade and investment activities.<sup>536</sup> The state, in turn, fostered additional growth in these sectors by a favorable tax structure; generous tax exemptions and freeport legislation; the elaboration of a system of industrial development bond financing; vocational training programs; and the establishment of foreign trade offices at a

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<sup>534</sup> FOREIGN INVESTMENT IN GEORGIA: A BUSINESS REFERENCE GUIDE 22 (E. R. Lanier, ed., 1982)

<sup>535</sup> *Ibid*, at 23.

<sup>536</sup> *Id*.

number of critical venues around the globe, all of which fostered the rise of Atlanta and Georgia as focal points for international cultural, trade, investment and commercial relations.<sup>537</sup>

Douglas H. Yarn –in an article published in 1987 in support of the adoption of a new and revised arbitration code for the State of Georgia intended to encompass provisions addressing the particular problems of international commercial arbitration while rationalizing and updating the existing code’s terms relative to domestic arbitrations as well– noted that among those areas requiring special attention in the transnational context were “the unique problems of international arbitration, such as language, foreign currency awards, enforcement of foreign awards, and the nationality of the arbitrators.”<sup>538</sup> Philip L. Ray, Jr., a major advocate of Georgia’s adoption of modern statute to govern international commercial arbitrations, made out a convincing case for the adoption of a special international commercial arbitration law for the state , emphasizing the comparative disadvantage which Georgia would suffer in the absence of such legislation:

In the competition to bring industry and economic development to Georgia the perception that Georgia has an unfavorable legal environment for alternative dispute resolution is a negative consideration. This is particularly true in the international area, with Florida’s recent enactment of an international commercial arbitration statute and its establishment of an international commercial dispute settlement center. Other Southern

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<sup>537</sup> *Ibid*, at 23-24.

<sup>538</sup> Douglas H. Yarn, *Proposed Changes in the Arbitration Law of Georgia*, 23 GA. ST. BAR J. 153 (1987).

states, such as Texas, have also recently established international dispute settlement centers. To facilitate the continued development of Atlanta and other major Georgia cities as an [sic] international commercial and financial centers and the economic development for all of Georgia, it would be helpful to have a progressive domestic and international commercial dispute settlement law in Georgia.<sup>539</sup>

The Southeastern Office of the American Arbitration Association was even more blunt in assessing the need for the adoption of special international commercial arbitration laws in Georgia: “Arbitration is the dispute resolution method of choice in transnational transactions,” it stated. “Although federal arbitration law enforces arbitration agreements and awards involving foreign commerce, the confusing and backward nature of Georgia’s arbitration laws has had a subtle deleterious effect on international trade and investment in this state.”<sup>540</sup>

Despite the misgivings of some that the widespread adoption of state international

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<sup>539</sup> See Draft of *A Resolution in Support of Amending Georgia’s Commercial Arbitration Laws and Enacting an International Commercial Arbitration Statute*, submitted to the Board of Governors of the State Bar of Georgia, by Philip L. Ray, Jr., October 24, 1986, reproduced in Memorandum, *International Commercial Arbitration Proposal*, from George E. Hibbs, Assistant General Counsel of the State Bar of Georgia, to the Advisory Committee on Legislation of the State Bar of Georgia, dated October 27, 1986, in the possession of the author.

<sup>540</sup> Press Release, “The Georgia Arbitration Code,” transmitted to Rhys Wilson by the Southeastern Regional Office of the American Arbitration Association under letter dated March 28, 1988, a copy of which is in the possession of the author. The AAA continued, in praise of the standards established by the 1988 Georgia Arbitration Code: “The new GAC not only resolves this problem, it also provides a set of provisions applicable to international commercial arbitrations. These provisions make Georgia’s legal environment particularly conducive for international commercial arbitration and are designed to attract international commercial disputes to our state for resolution in the arbitral forum.” *Id.*

arbitration codes might have a detrimental effect in attracting arbitrations to the United States,<sup>541</sup>

Georgia's code became law in the 1988 session of the Georgia General Assembly.<sup>542</sup>

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<sup>541</sup> J. Stewart McClendon argues:

There are at least two potentially serious problems created by most state efforts to attract business by adopting international arbitration legislation. One is the risk of confusion created by increasingly complicated state laws that depart from the UAA and the FAA; the other is increased lack of uniformity between the arbitration laws of the various states. Both problems have the potential to make it more difficult for foreign users to understand how international arbitration operates in the United States. In short, many of the state efforts to attract international arbitration are likely to be counterproductive.

J. Stewart McClendon, *State International Arbitration Laws: Are They Needed or Desirable?*, 1 AM. REV. INT'L. ARB. 245, 259 (1990) (Footnotes omitted), quoted in Sébastien Besson, *The Utility of State Laws Regulating International Commercial Arbitration and Their Compatibility With The FAA*, 11 AM. REV. INT'L. ARB. 211, 244 (2000). Besson concurs generally in the opinion of McClendon, finding "that the enactment of state laws on international arbitration creates serious risk of confusion for foreign users. It could even be misleading to propose and promote a legal regime, which is preempted by the federal arbitration law on very important questions." *Ibid.*, at 245.

There is substantial academic and scholarly commentary to the contrary, of course. George K. Walker takes the position that "... while international agreements to which the United States is a party, federal statutes, and federal common law necessarily trump state law, where applicable, there is an appropriate place for the state acts":

Particularly, this is the current situation since Congress has not yet revised federal statutes governing arbitration. Even where federal law does apply, the state acts may supply norms if adopted as rules. The state acts may apply may play an interstitial role in a transaction otherwise governed by federal law. Even if federal law controls, the state acts may be factors in informing the policy for the choice of federal law. In any future amendments of the federal arbitration statutes, Congress may choose to incorporate state law by reference.

George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C.J. INT'L. & COM. 419 (1992) (Footnotes omitted).

<sup>542</sup> 1988 Ga. Laws 903 § 1 *et seq.*, codified as O.C.G.A. § 9-9-30-43 (2001 Supp.).

As adopted in 1988, the Georgia International Transactions Arbitration Code addresses not only these challenges, but it does so in such a way that its “provisions work in tandem with the domestic rules, forming a single integrated set of arbitration provisions.”<sup>543</sup> Yarn provided an assessment of the impact, domestic and international, which the adoption of these provisions would entail:

The new Arbitration Act is carefully crafted to provide a flexible procedural framework for the arbitral resolution of disputes arising under a broad range of domestic and international transactions. As with the application of the existing construction arbitration provisions, the modified version provides for party autonomy in fashioning the arbitration process, reflecting principles of fairness and equality in the treatment of parties, and includes basic provisions for the functioning of arbitration proceedings where the parties have failed to do so. It is submitted that the proposed act strikes a proper balance between arbitration and the courts. The role of the courts is one of assistance, supportive of the arbitral process while not interfering or speculating on the merits. Most importantly, basic considerations of procedural process are well protected. The right of each party to be informed of all claims, evidence, and arguments presented against it and to receive adequate notice and an opportunity to be heard is safeguarded.<sup>544</sup>

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<sup>543</sup> *Id.*

<sup>544</sup> *Ibid.*, at 153-154. Yarn makes explicit the various sources which influenced the specific terms of the new Georgia International Transactions Arbitration Code.

In the course of its work, the drafting group studied and compared the current or proposed arbitration laws of New York, California, and all the states of the Southeast; the United Kingdom, and

The 1988 Georgia International Transactions Arbitration Code makes explicit the fact that it is an integral part of the title of the Georgia Code addressing arbitration, and not a free standing set of principles divorced from the existing provisions relating to arbitration. This stands in contrast to the approach adopted in other states, where an attempt was made to set international arbitration provisions apart as distinct and independent portions of the state law:

In order to encourage the use of arbitration in the resolution of conflicts arising out of international transactions effectuating the policy of the state to provide a conducive environment for intentional business and trade, this part [2, The Georgia International Transactions Arbitration Code] supplements part 1 of this article [the general arbitration code] and shall be used concurrently with the provisions of part one of this article whenever an arbitration is within the scope of this part.<sup>545</sup>

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France; the Uniform Arbitration Act drafted by the Commissioners on Uniform State Laws; the Federal Arbitration Act, including Title II implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the Inter-American Convention on International Commercial Arbitration recently ratified by the United States Senate; and the model international commercial arbitration statute developed by the United Nations Commission on International Trade Law (“UNCITRAL”). In addition, the drafting group reviewed recent legislation in Florida and British Columbia which created entirely separate sets of provisions for the arbitration of international commercial disputes.

*Id.* The single most influential of these appears to have been the UNCITRAL initiative.

<sup>545</sup> O.C.G.A. § 9-9-30 (2001 Supp.).

Statements of the scope of the International Transactions Arbitration Code were expressly articulated in the statute, employing terms reminiscent of the approach taken by the Federal Arbitration Act<sup>546</sup> in its delineation of scope in its international part:

[The Georgia International Transactions Arbitration Code] shall apply to arbitrations within its scope notwithstanding provisions in Part 1 in this article to the contrary.

(b) This part shall apply only to the arbitration of disputes between:

- (1) two or more persons at least one of whom is domiciled or established outside the United States; or
- (2) two or more persons all of whom are domiciled or established in the United States if the dispute bears some relation to property, contractual performance, investments, or other activity outside the United States.<sup>547</sup>

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<sup>546</sup> See 9 U.S.C. § 202:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the [United Nations] Convention [on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958]. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

If anything, the Georgia analogue appears stronger than its federal counterpart: while the federal act extends only to foreign elements considered to have a reasonable relationship to the transaction, the Georgia act appears content to extend the international provisions wherever there is *any* relationship to property or activity outside the United States.

<sup>547</sup> O.C.G.A. § 9-9-31 (2001 Supp.). The dispositions of this section bear the unmistakable traces of Article 1 (“Scope of application”) of the United Nations

Expanding on the statutory requirement that, in order to come within the scope and ambit of the Georgia International Transactions Arbitration Code, the agreement to arbitrate need be in writing as required by the general provisions of the Georgia Arbitration Code,<sup>548</sup> the 1988 legislation defined with more particularity what would constitute an “agreement in writing.”

The Code provides in this respect that:

For purposes of this part, in particular, an agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration

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Commission on International Trade Law [UNCITRAL] Model Law of 1985 (adopted by the United Nations Commission on International Trade Law on 21 June 1985) which provides for the application of its terms to an arbitration if the parties to an arbitration agreement have, at the time of the conclusion of their agreement, their places of business in different states; or the place of arbitration, the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected relates to more than one country. Both the 1988 Georgia International Transactions Arbitration Code and the UNCITRAL Model Law of 1985 owe, of course, much of their spirit, if not their letter, to Article I of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards June 10, 1960 (“The New York Convention”), and its United States analog, 9 U.S.C. § 202, discussed *supra*. This article of the New York Convention provides essentially that arbitral awards which are made in a country other than the enforcing state or which are otherwise regarded as nondomestic under the law the enforcing state will be accorded the favorable treatment provided for in the Convention terms. The New York Convention will be discussed further, particularly with respect to the defenses to the enforcement of arbitral awards made available in its Article V, *infra* in this survey’s present Chapter, Section 6, “The 2003 Amendment to the 1988 Georgia Arbitration Code: Manifest Disregard of Law.”

<sup>548</sup> O.C.G.A. § 9-9-2(c) (2001 Supp.).



agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract.<sup>549</sup>

Secondly, while the provisions of the Georgia Arbitration Code of 1988 did not carry forward the particular standards of arbitrator competence which had been apparent in the 1978 legislation, the Georgia International Transactions Arbitration Code, nonetheless, elected to make clear one principle regarding arbitrator qualification: “[n]o person [is to] be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.”<sup>550</sup>

The existing provisions of the 1988 Georgia Arbitration Code respecting provisional relief were similarly elaborated in the International Commercial Arbitration Code by making specific provision for broader forms of interim relief than those specifically contemplated in the domestic legislation:

[t]he arbitrators may grant such interim relief as they consider appropriate and, in so doing, may require a party to post bond or give other security. The power conferred in this Code Section upon the arbitrators is without prejudice to the right of a party to request interim relief directly from any court, tribunal, or other governmental authority, inside or outside this state, and to do so without prior authorization of the arbitrators.<sup>551</sup>

In a provision touching upon a major substantive consideration respecting the jurisdictional authority of the arbitral tribunal, the Georgia International Transactions Arbitration Code of 1988 specifically adopted the doctrine of

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<sup>549</sup> O.C.G.A. § 9-9-32 (2001 Supp.). Article 7(2) of the UNCITRAL Model Law of 1985 is the source of the inspiration for this section of the Georgia law.

<sup>550</sup> O.C.G.A. § 9-9-33 (2001 Supp.). *See* Article 11(1) of the UNCITRAL Model Law of 1985 for the corresponding terms of the international standard.

<sup>551</sup> O.C.G.A. § 9-9-35 (2001 Supp.). *Compare* Article 9 and Article 17 of the UNCITRAL Model Law of 1985: the Georgia provision tracks the international expectation in this respect.

*compétence de la compétence*.<sup>552</sup> This principle –which has now gained wide international

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<sup>552</sup> This doctrine essentially leaves it to the arbitrators to pass on challenges to their authority rooted in allegations of contract invalidity. If arbitrators were required under the applicable arbitral law to cease their proceedings in order to give way to a judicial ruling on challenges to the arbitration panel’s power [*compétence*] over the dispute generally, the arbitral process might well become a mere adjunct of the conventional court and the extrajudicial procedure could lose much of its effectiveness. The Supreme Court of the United States, in *Prima Paint v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), adopted the general principle that the under the Federal Arbitration Act, a claim of fraud in the inducement of an entire contract is for the arbitrators to decide under an arbitration clause providing for reference of *any controversy or claim* arising out of or relating to the agreement or breach thereof, in the absence of evidence that contracting parties intended to withhold that issue from arbitration. This rule, generally interpreted as very supportive of the institution of arbitration, is now reflected in most international institutional arbitral rules, including those of the UNCITRAL itself. *See* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES (adopted by the United Nations Commission on International Trade Law on 28 April 1976), Article 21(1) (“The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.”). *But see*, in a purely domestic case, *Stewart v. Favors*, 264 Ga. App. 156 (2003), where the Georgia Court of Appeals ruled that it was for the court, and not for the arbitrators, “to pass on the enforceability of the agreement to arbitrate where the consumer raised a clear and specific challenge to the enforceability of the arbitration provisions in both the loan contract and the agreement accompanying [a] auto club contract. Under these circumstances,” the Georgia Court of Appeals ruled, “the lower courts construing *Prima Paint* are in agreement that it is the court that has authority to decide whether the arbitration provision is enforceable.” *Ibid*, at 3. Since *Prima Paint*, the U.S. Supreme Court, in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), has stressed that issues of arbitrability and the allocation of authority over these “gateway” questions between the courts and the arbitral panel are to be resolved according to the intentions of the parties, subject to the application of ordinary state-law contract principles. In the absence of evidence to the contrary, courts are not to presume the arbitration of such questions. *First Options*, at 943. The federal supreme court’s position on these matters has been recently refined in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003); and *Green Tree Financial Corp v. Bazzle*, 123 S. Ct. 2402 (2003). On the current position of the U. S. Supreme Court on issues of arbitrability and the competence of the arbitral tribunal, *see* June Lehrman, *On The Threshold of Arbitration*, 26-DEC. L.A. LAW. 20 (2003) and Richard Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 S.M.U. L. REV. 819 (2003). *See also*, in a Georgia domestic context, *BellSouth Corp. v. Forsee*, 2004 WL 170145, where the Georgia Court of Appeals approved the grant of permanent

acceptance, although a somewhat tepid and mixed reaction from United States courts and lawmakers<sup>553</sup> – is incorporated into Georgia law by the statute providing that:

[t]he arbitrators may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not thereby invalidate the arbitration clause.<sup>554</sup>

The Georgia International Transactions Arbitration Code further responded to particular concerns in the context of international dispute resolution by making clear and certain that the parties to the arbitral agreement enjoyed autonomy with respect to the selection of the language of their proceeding:

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interlocutory relief withdrawing issues of arbitrability from a panel of arbitrators on the twin basis that the party invoking equitable relief in the conventional court was also the party seeking to compel arbitration and that, in addition, such action by the trial judge was consistent with the provisions of O.C.G.A. § 9-9-4 (2001 Supp.) which, as construed by the court, authorized judicial determination of these issues of arbitrability.

<sup>553</sup> Daniel A. Zeff summarizes the status of the doctrine in the United States context, writing that “Supreme Court precedent establishes that with regard to cases subject to the FAA, the arbitrators do not have the authority in most instances to resolve disputes concerning the validity or scope of an arbitration agreement, but rather such questions require judicial resolution in most cases,” citing in support of this proposition *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 171 (1963), as well as *dicta* in *Prima Paint Corp. v. Floodng & Conklin Manufacturing Co.*, 388 U.S. 395, 403-404 (1967), suggesting that “if the claim is fraud in the inducement of the arbitration clause itself [as opposed to fraud in the inducement of the whole contract, a matter appropriate for arbitral resolution] ... the federal court may proceed to adjudicate it.” See Daniel A. Zeff, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C.J. INT’L L. & COM. REG. 705, 773 (1997).

<sup>554</sup> O.C.G.A. § 9-9-34 (2001 Supp.). This language is taken essentially from Article 16(1) of the UNCITRAL Model Law OF 1985.

The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitrators shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing, and any award, decision, or other communication by the arbitrators.

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(b) the arbitrators may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitrators.<sup>555</sup>

Responding to considerations which were paramount in *Volt Information Sciences, Inc. v. Stanford University*<sup>556</sup> the Georgia International Transactions Arbitration Code makes clear that “[s]election of this state as the place of arbitration shall not in itself constitute selection of the procedural or substantive law of that place as the law governing the arbitration.”<sup>557</sup> This provision makes clear that the mere fact of an arbitral proceeding having its seat in Georgia under the agreement of the parties will not necessarily constitute a selection of the law of this

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<sup>555</sup> O.C.G.A. § 9-9-37 (2001 Supp.). The language of this section is drawn virtually verbatim from UNCITRAL Model Law Article 22.

<sup>556</sup> *Volt Information Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989). In *Volt*, the federal high court took the position that a contractual choice of California law by the parties to an agreement served as basis for the application of California procedural and substantive law in an arbitral proceeding arising out of that agreement, even to the point of displacing the provisions of the Federal Arbitration Act. Essentially the court underscored the party autonomy which is a dominant feature of modern arbitration rules and emphasized the capacity of the parties to determine most aspects of their arbitral procedure for themselves. *Volt* is considered at greater length, *infra*, in Chapter Three of this survey, Section 1, The Doctrine of Federal Preemption and the Autonomy of Georgia Arbitration Policy.

<sup>557</sup> O.C.G.A. § 9-9-36 (2001 Supp.).

state as the law applicable to the procedural or to the substantive law relevant to the resolution of the dispute. No language in this code section, however, prevents the parties from making such an election if they choose to do so as a matter of private agreement.

The statutory standard in Georgia respecting the use of expert testimony is drawn into line with international understanding and practice by the provisions of the Georgia International Commercial Arbitration Code stipulating that:

- (a) unless otherwise agreed by the parties, the arbitrators:
  - (1) may appoint one or more experts to report on specific issues to be determined by the arbitrators; and
  - (2) may require a party to give the expert any relevant information or to produce or to provide access to, any relevant documents, goods, or other property for his inspection.
- (b) unless otherwise agreed by the parties, if a party so requests or if the arbitrators consider it necessary, the experts shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.<sup>558</sup>

Although there is a long domestic tradition in United States arbitration that arbitrators are not required to provide a statement of the legal and factual reasons supporting their awards, this American practice has long been regarded as a peculiarity at the international level where

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<sup>558</sup> O.C.G.A. § 9-9-38 (2001 Supp.). Here too, the language of this section is drawn virtually verbatim from UNCITRAL Model Law of 1985, in this instance from that instrument's Article 26.

*reasoned awards* are the virtually universal norm.<sup>559</sup> In language designed to draw the Georgia practice into line with the international understanding at least with respect to international arbitrations, the 1988 Georgia International Transactions Arbitration Code provides:

- (a) A written statement of the reasons for an award shall be issued if the parties agree to the issuance thereof or the arbitrators determine that a failure to do so could prejudice recognition or enforcement of the award.<sup>560</sup>

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<sup>559</sup> William W. Park summarizes these contrasting traditions:

Without exception, all major institutional rules for international commercial arbitration (ICC, LCIA, AAA International, UNCITRAL, ICSID and Geneva Chamber of Commerce) require arbitrators to state the grounds for their decision unless the parties explicitly opt out of a reasoned award. . . .

A written opinion adds rigor to the process. Arbitrators required to explain themselves must think more about the basis for their decisions. Conversely, sloppy and lazy arbitrators will have an easier time without having to give an account of the why and wherefore of their award. Reasoned awards are not an unalloyed blessing, however. By giving the loser a hook on which to challenge the award, they may detract from finality. For this reason the American Arbitration Association (AAA) in domestic cases has long discouraged reasoned awards. The marketplace has pushed international arbitration toward reasoned awards. Even for disputes decided within the AAA framework, a separate set of rules requires reasoned awards for international controversies. When millions of dollars are at stake, neither business managers nor governments find a "check-the-box" approach satisfying. In many Continental European legal systems, reasoned opinions are mandatory

William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803 (2002), at 823-824 (footnotes omitted). See also Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998).

<sup>560</sup> O.C.G.A. § 9-9-39(a) (2001 Supp.). This section reflects the underlying intent of UNCITRAL Model Law Article 31(2). In *Trend-Pak of Atlanta, Inc. v. Arbor Commercial Div., Inc.*, 197 Ga. App. 137 (1990), this section was construed to mean that there does not exist in Georgia law any requirement, absent a request by the parties under

(b) If so agreed by the parties, a party, with notice to the other party, may request the arbitrators to give an interpretation of a specific point or part of the award.

The interpretation shall form part of the award.

(c) The arbitrators may award reasonable fees and expenses actually incurred, including, without limitation, fees and expenses of legal counsel to any party to the arbitration and shall allocate the cost of the arbitration among the parties as it deems appropriate.<sup>561</sup>

Responding to some American precedent holding otherwise, the Georgia International Transactions Arbitration Code provides that “[t]he courts of [Georgia] shall confirm or vacate a

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this provision, that the award of the arbitrators recite specific reasons or findings in support of the resulting award; nor is it necessary under this law that each and every issue, including relevant collateral issues arising in the course of the arbitration, be addressed in the award, the court citing *Cotton States Ins. Co. v. Nunnally Co.*, 176 Ga. App. 232 (1985) in support of this view as well as the terms of this section. Accordingly, the court affirmed a judgment of the trial court confirming the award, there not being otherwise any ambiguity or indefiniteness on the face of the award. The basis for the court’s application of O.C.G.A. § 9-9-39(a) (2001 Supp.) is unclear, however, since the parties to the litigation apparently were domestic corporations and there was no other discernible international affiliation of the case.

<sup>561</sup> O.C.G.A. § 9-9-39 (2001 Supp.). Subsection ©) adopts as law in Georgia the international trend in commercial arbitration, heavily influenced by the so-called “English Rule” permitting the award of attorneys fees to the prevailing party and against the loser. This loser-pays-all approach, while there is much to recommend it, remains the object of debate in the United States and is not widely applied across the board in American civil litigation; the fashion is otherwise, however, with respect to the award of fees in international commercial arbitration proceedings, and this Georgia law is consistent with both that trend and with the position of the UNCITRAL Model Law of 1985 on this issue. On the general question of the award of fees in litigation, see W. Kent Davis, *The International View of Attorneys Fees in Civil Suits: Why Is the United States the “Odd Man Out” In How It Pays Its Lawyers?*, 16 ARIZ. J. INT’L & COMP. L. 361 (1999). On the issue of the American Rule and international commercial arbitration specifically, see John Yukio Gotanda, *Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations*, 21 MICH. J. INT’L L. 1 (1999).

final award, notwithstanding the fact that it grants relief in a currency other than United States dollars.<sup>562</sup>

In some American case law, courts have shown a special sensitivity to the issue of whether or not a court asked to confirm an arbitral award may do so if that same arbitral award has been the subject of prior judicial action either within or outside of the United States.<sup>563</sup> In part, this special sensitivity has arisen from doubts as to whether or not an American court has statutory authority under the Federal Arbitration Act to confirm and enforce a foreign *judgment*, since the United States is not a party to any multilateral instrument providing for the mutual or reciprocal recognition of foreign court judgments.<sup>564</sup> Hence, the paradox has arisen that an American court is obligated to enforce a foreign arbitral award, this under the provisions of multilateral instruments to which the United States is a party, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>565</sup> but does not have the same obligation with respect to a judgment of a foreign tribunal. A conceptual uncertainty arises when the foreign award (presumably enforceable *qua* award) has been reduced to a judgment in a court, foreign or domestic. The ambiguities originating in this doctrine of “merger” are the subject of special language in the 1988 Georgia International Transactions Arbitration Code:

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<sup>562</sup> O.C.G.A. § 9-9-40 (2001 Supp.).

<sup>563</sup> *See*, on this question, *Island Territory of Curaçao v. Solitron Devices, Inc.*, 489 F.2d 1313 (1973); *see also* *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir.1975).

<sup>564</sup> For a general and current review of efforts to standardize and harmonize procedural aspects of divergent legal systems with respect to enforcement of foreign judgments, *see* James P. George, *International Parallel Litigation – A Survey of Current Conventions and Model Laws*, 37 TEX. INT’L. L. J. 499 (2002). *See also* Linda Silberman, *Comparative Jurisdiction in the International Context: Will The Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319 (2002).

<sup>565</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T 2517, T.I.A.S No. 6997, 330 U.N.T.S 3, *codified in* 9 U.S.C.A §§ 201-208 (1970), discussed *infra* in greater detail.



If a final award has been reduced to judgment or made the subject of official action by any court, tribunal, or other governmental authority outside the United States, the courts of this state shall confirm or vacate the award without regard to any term or condition of the foreign judgment or official action and without regard to whether the award may be deemed merged into the judgment.<sup>566</sup>

In a measure intended to further integrate Georgia practice with regard to the enforcement of foreign arbitral awards, the 1988 Georgia International Transactions Arbitration Code reaches out and captures federal standards in this respect:

An arbitration award irrespective of where it was made, on the basis of reciprocity, shall be recognized as binding and shall be enforceable in the courts of this state subject to the grounds for vacating an award under [the 1988 Georgia Arbitration Code] and providing that the award is not contrary to the public policy of this state with respect to international transactions. Reciprocity in the recognition and enforcement of foreign arbitral awards shall be in accordance with applicable federal laws, international conventions, and treaties.<sup>567</sup>

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<sup>566</sup> O.C.G.A. § 9-9-41 (2001 Supp.). The federal circuit court opinion in *The Island Territory of Curaçao v. Solitron Devices, Inc.*, 489 F.2d 1313 (1973), rehearses the issues which underlie the language of this section of the Georgia International Transactions Arbitration Code.

<sup>567</sup> O.C.G.A. § 9-9-42 (2001 Supp.). The United States acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards subject to a stipulation requiring reciprocity in the enforcement of the Convention. This provision of the Georgia International Transactions Arbitration Code mirrors that federal standard. The extent to which the 2003 amendment to the Georgia Arbitration Code elevating “manifest disregard of law” to the status of a ground for the vacatur of an arbitral award under Georgia law impacts on foreign arbitral awards and nondomestic awards governed

The conduct of an arbitral proceeding falling under the 1988 Georgia International Transactions Arbitration Code will presumably involve parties whose seats are in different countries or, alternatively, address a subject matter or property located offshore. The presence of these factors will necessarily entail a measure of delay more extensive than that which typically would appear in the context of domestic arbitration. This circumstance augurs for lengthened time periods for mandatory actions in the arbitral process. For this reason, the Georgia International Commercial Arbitration Code, in O.C.G.A. § 9-9-43, makes provisions for extended time periods in circumstances where a party to the arbitral proceeding may or must take certain action, doubling the time for making applications for both stays of arbitration<sup>568</sup> and for applications to arbitrators to change their award<sup>569</sup> and, in addition, trebling the ten day notice period for notification of arbitral hearings.<sup>570</sup>

The provisions of the 1988 Georgia International Transactions Arbitration Code, as adopted by the Georgia General Assembly that year, were unquestionably long overdue, and they clearly responded to a critical need and a demonstrated statutory gap then existing in Georgia's legislative provisions for arbitration. The substantive content of that Code was carefully crafted to respond to the peculiar and special needs of arbitration in the international trade and commercial context; moreover, Georgia's International Transactions Arbitration Code demonstrated a profound sensitivity to developments in the field of international commercial arbitration at the national and international levels, taking into account

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by the New York Convention is discussed further, *infra*, in this Chapter of the present survey, in Section 6, "The 2003 Amendment to the 1988 Georgia Arbitration Code: Manifest Disregard of Law."

<sup>568</sup> Thirty days is the normal period for this purpose. O.C.G.A. § 9-9-6 (2001 Supp.). *Cf.* O.C.G.A. § 9-9-43(1).

<sup>569</sup> O.C.G.A. § 9-9-11 (2001 Supp.), providing twenty days after delivery of the award to the applicant in normal circumstances. *Cf.* O.C.G.A. § 9-9-43(1).

<sup>570</sup> O.C.G.A. § 9-9-8 (2001 Supp.). *Cf.* O.C.G.A. § 9-9-43(3).

current developments in both United States federal, foreign, and international law bearing on arbitration in private international trade. It may be significant, however, that, in only a single instance has any term or provision of the Georgia International Transactions Arbitration Code, as of early 2004, come before any court –state, federal, foreign or international– for judicial construction or application.<sup>571</sup>

#### Section 6. The 2003 Amendment to the 1988 Georgia Arbitration Code: Manifest Disregard of Law

From the time of its initial adoption until the end of the twentieth century and on into the first years of the new millennium, Georgia's 1988 arbitration code settled quietly into its place as Georgia's legislative keystone in the structure of statutory arbitration. Little attention, whether public, legislative or judicial, was directed to the new code, at least not until an issue –seemingly of little widespread interest and touching few sensitive nerves among the public at large– ignited

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<sup>571</sup> In that one instance –*Witty v. McNeal Agency, Inc.*, 239 Ga. App. 554 (1999)– O.C.G.A. § 9-9-32 was cited, along with O.C.G.A. §§ 9-9-2, 9-9-6, and 9-9-61, for the general proposition that arbitration is generally voluntary and subject to the agreement of the parties. *See Witty*, at 555. Another apparent qualification to this statement is necessary with respect to the decision of the Georgia Court of Appeals in *Trend-Pak of Atlanta, Inc. v. Arbor Commercial Div., Inc.*, 197 Ga. App. 137 (1990), discussed *supra*, where the Georgia International Transactions Arbitration Code was also cited. While that decision considered the terms of O.C.G.A. § 9-9-39 [the provisions of the Georgia International Transactions Arbitration Code touching on the necessity for reasoned awards], it does not appear that, in fact, the case invoked the application of that Code since there were in the facts of the dispute no apparent international element of any kind. The case stands, nevertheless, as the only instance (other than the *Witty* decision) in which *any* appellate court has ever acknowledged the existence of this important 1988 legislation.

a firestorm of controversy respecting not only the inner workings of the code but the proper role of private arbitration in modern Georgia society.

*Disregard of the Law as a Basis for Arbitral Award Vacatur in Georgia Law*

For more than a century, Georgia statutory law had admitted of the possibility of setting aside an arbitral award—at least if it were one of those governed by the provisions of the Cobb Code of 1863—where it was infected by a “palpable mistake of law” on the part of the arbitrators who fashioned it.<sup>572</sup> Even so, the courts were loathe to set aside awards on this basis, and the application of the rule was as narrow as it was rare:

The general rule is this: an award cannot be impeached but for corruption, partiality or gross misbehavior in the arbitrators, or for some palpable mistake of the law or fact. Awards are treated with great liberality. The parties make the

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<sup>572</sup> See O.C.G.A. § 9-9-11 (repealed 1988), discussed *supra*, providing that “[a]n award may be set aside,” *inter alia*, “for a palpable mistake of law.” A “palpable” legal mistake under this statute had been equated in the courts with a “plain” mistake. See *Crabtree v. Green*, 8 Ga. 8 (1850). For further references to this standard in Georgia law, see *Ralston v. City of Dahlonega*, 236 Ga. App. 386 (1999); *Southern General Ins. Co. v. Kent*, 187 Ga. App. 496 (1988); *Local Div. 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority*, 251 Ga. 15 (1983); *Bituminous Cas. Corp. v. United Services Auto. Assen*, 158 Ga. App. 739 (1981); *Fisher v. Gause*, 236 Ga. 663 (1976); *Skinner v. Smith*, 120 Ga. App. 35 (1969); *State Highway Dept. v. W. L. Cobb Const. Co.*, 111 Ga. App. 822 (1965); *Jordan v. General Ins. Co. of America*, 92 Ga. App. 77 (1955); *Pacific Nat. Fire Ins. Co. v. Beavers*, 87 Ga. App. 294 (1952); *Barnes v. Avery*, 192 Ga. 874 (1941); *Johns v. Security Ins. Co.*, 49 Ga. App. 125 (1934); *Murray v. Hawkins*, 144 Ga. 613 (1916); *Eberhardt v. Federal Ins. Co.*, 14 Ga. App. 340 (1913); *Parsons v. Ambos*, 121 Ga. 98 (1904); *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296 (1897); *Jones v. Bond*, 76 Ga. 517 (1886); *Black v. Harper*, 63 Ga. 752 (1879); *Brand v. Sorrells*, 61 Ga. 162 (1878); *Virginia Home Ins. Co. v. Gray*, 61 Ga. 515 (1878); *Spearman v. Wilson*, 44 Ga. 473 (1871); *Anderson v. Taylor*, 41 Ga. 10 (1870); and *Sasseen, Whitaker & Co. v. Weakley*, 34 Ga. 560 (1866).

arbitrators judges, and their judgment has much of the solemnity which attaches to the judgment of a Court of Justice. The rule above laid down, obtains in Equity. It is still more stringent at Law. At Law, an award, upon a submission which involves both law and facts, will not be opened for a mistake of the law, unless the mistake appear on the award itself, and even then, it must be in a case where the arbitrator, intending to apply the law correctly, has mistaken what the law is. . . . Parties may submit *the law* to arbitrators--they may clothe them with power to decide *that*, or to decide upon equitable principles, irrespective of the rules of law. I apprehend that no case is to be found, where the question of law being submitted distinctly, and the judgment being on that question, nakedly, that judgment has been opened because of a mistake of the law. That is this case.<sup>573</sup>

When the Georgia legislature came to the adoption of the Construction Arbitration Code of 1978, the old “palpable mistake of law” basis for award vacatur was left intact as it had appeared in the 1863 common law codifications, but it was not carried forward to the new (and separate) statutory scheme<sup>574</sup>; nor, significantly, was it brought into the 1988 recitation of available bases for vacation of awards when the current Georgia Arbitration Code was adopted as law a decade later.<sup>575</sup>

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<sup>573</sup> Crabtree v. Green, 8 Ga. 8 (1850), an opinion by Justice Nisbet.

<sup>574</sup> O.C.G.A. § 9-9-93 (repealed 1988), discussed *supra*.

<sup>575</sup> O.C.G.A. § 9-9-13 (2001 Supp.), discussed *supra*.

Although neither the Federal Arbitration Act<sup>576</sup> nor the Uniform Arbitration Act<sup>577</sup> enumerate any analogy to Georgia’s common law “palpable disregard” standard for vacatur or setting aside of arbitral awards, the defense of manifest disregard of law –conceptually quite close to the old Georgia variant– has nevertheless managed to garner some currency, especially in the federal courts:

In federal circuit courts ... in addition to the statutory provisions, there have been limited judicially created bases for intervention. These include vacatur for reasons of public policy [*citing* *Associated Coal Corp. v. United Mine Workers of Am.* 531 U.S. 57, 67 (2000) and *Delta Airlines, Inc. v. Air Line Pilots Ass’n*, 861 F. 2d 665, 671 (11<sup>th</sup> Cir. 1988), *cert. denied*, 493 U.S. 871 (1989)], or because the award is deemed arbitrary and capricious [*citing* *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F. 2d (1410) (11<sup>th</sup> Cir, 1990)], or because the award

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<sup>576</sup> Federal Arbitration Act of 1925, § 10(a), stipulates that awards may be vacated:

- (1) Where the award was procured by corruption, fraud or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

<sup>577</sup> Uniform Arbitration Act §§ 1-25, 7 U.L.A 6-469 (1997) [“UAA”], National Conference of Commissioners on Uniform State Law (NCCUSL), <http://www.nccusl.org>, *cited* in John F. Allgood and E. R. Lanier, *Manifest Disregard of the Law*, 10<sup>th</sup> Annual ADR Institute and the 2003 Neutrals Conference: Celebrating 25 Years of ADR: A Glance Back A Look Forward (Lake Lanier Island, Georgia, November 20-22, 2003), at Vol. I, Chapter 3-A [hereinafter, Allgood & Lanier], 3.

given by the arbitrator is in “manifest disregard of the law”. This last basis derives from dicta by the U.S. Supreme Court in *Wilko v. Swan* [346 U.S. 427, 436, 74 S. Ct. 182, 98 L. Ed 2d 168 (1953)]. In that decision the Court looked to earlier maritime cases and said that arbitration awards *could* be set aside based on a manifest disregard of the law [*Id.*, at 436]. No Supreme Court case, however, has ever so held. Some commentators have suggested these dicta must be read in the context of the F.A.A. Section 10 (a) and not as a new exception [citing Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev 731, 814-815 (1996) and Michael P. O’Mullen, Note, *Seeking Consistency in Judicial Review of Securities Arbitration, an Analysis of the Manifest Disregard of the Law Standard*, 64 Fordham L. Rev. 1121 (1995)]. The same author suggests that the Court implicitly overruled *Wilko* in its 1989 decision, *Rodriguez de Quijas v. Shearson Lehman Bros., Inc.*, 490 U.S. 477 [citing Stephen L. Hayford, *Reining in the “Manifest Disregard” of the Law Standard: the Key to Restoring Order to the Law of Vacatur*, 1998 J. Disp. Resolution 117, 121]. Nevertheless, the federal circuit courts have adopted some formulation of manifest disregard of the law as judicially created grounds for vacatur [citing *NCR Corp. v Sac-Co., Inc.*, 43 F. 3d 1076, 1079 (6<sup>th</sup> Cir. 1995) (arbitrator exceeded powers and punitive damage award vacated under § 10 of FAA.)].<sup>578</sup>

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<sup>578</sup> Allgood & Lanier, 3-4. See also the discussion of the evolution of the federal common law understanding of “manifest disregard of law” as a basis for award vacatur in Douglas H. Yarn, *Are Arbitrators Bound to Follow the Law? Vacating Arbitral Awards for “Manifest Disregard” of Law in Georgia*, 10<sup>th</sup> Annual ADR Institute and the 2003

Given the long experience in Georgia with the “palpable mistake of law” standard under the Cobb Code and the glaring absence of any similar principle under the 1978 and 1988 state legislative initiatives in the field of arbitration, it should not be surprising that litigants before Georgia courts would, from time to time, urge the adoption of some such standard as a matter of common law in the state. In *Bartlett v. Dimension Designs, Ltd.*,<sup>579</sup> a 1990 decision of the Georgia Court of Appeals, the court seemed implicitly to accept the proposition, based on federal law,<sup>580</sup> that such a basis for the vacation of awards existed in Georgia, but refused to apply it in that case.<sup>581</sup> The inference in *Bartlett* that manifest disregard of law would, however,

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Neutrals Conference: Celebrating 25 Years of ADR: A Glance Back A Look Forward (Lake Lanier Island, Georgia, November 20-22, 2003), at Vol. I, Chapter 3, at 8-27.

<sup>579</sup> 195 Ga. App. 845 (1990).

<sup>580</sup> *French v. Merrill Lynch, etc., Inc.*, 784 F.2d 902 (1986) (holding that an arbitrator’s decision must be upheld unless it is completely irrational or it constitutes a manifest disregard of law). The Georgia court suggested that it agreed with the *French* court’s rule of manifest disregard of law:

In *French v. Merrill Lynch, etc., Inc.*, 784 F.2d 902(3) & (4) (9th Cir.), the court concluded that an arbitrator’s decision must be upheld unless it is completely irrational or it constitutes a manifest disregard of the law. This court is in agreement with this general rule and finds no reason to depart from it in this case. As the record before us neither establishes that the arbitrator’s decision was completely irrational nor constitutes a manifest disregard of the law within the meaning of *French*, we are satisfied that the trial court did not err in its ruling.

*Bartlett*, 195 Ga. App. 845, at 848.

<sup>581</sup> The appellant in *Bartlett* argued that the arbitrator had applied an inappropriate level of burden of proof. The court rejected such as a grounds for vacating the award:

[A]rbitrators are not obliged to apply strict rules of law in the matter at hand, when they act within the scope of their authority, unless the parties require adherence to such rules. In fact, it is stated that they may disregard the traditional rules of law. Accordingly, as a general rule, arbitrators are free to apply broad principles of justice and good conscience, and decide



be an available basis on which to vacate a Georgia arbitral award was on its way, four years later, to becoming fixed in judicial stone when the *Bartlett* dictum was cited as a “general rule” in *Amerispec Franchise v. Cross*,<sup>582</sup> yet another ruling from the Georgia Court of Appeals. The same court extended this line of authority in support of the manifest disregard of law standard for award vacation in *Hundley v. Greene*,<sup>583</sup> and the *Bartlett* dictum recognizing manifest disregard of law as an element of Georgia arbitration law received yet another boost through favorable references by the Georgia Court of Appeals in *Hilliard v. J. C. Bradford & Company*, a decision handed down in 1997,<sup>584</sup> and in *Greenway Capital Corporation v. Schneider*, decided by that court later that same year.<sup>585</sup>

The Court of Appeals’ headlong rush to embrace the principle of “manifest disregard of law” as a matter of common law in Georgia was dealt a serious setback when the Georgia Supreme Court ruled on the appeal taken from the former court in *Greene v. Hundley*. There, the Court of Appeals, in a forceful opinion by Judge Birdsong, had ruled that an award lacking

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according to their concept or notion of justice. They are still obliged, however, to be guided by the basic agreement of the parties." 6 CJS, supra at § 70. We are satisfied from the state of the record before us that the arbitrator was applying broad principles of justice and good conscience rather than technical rules of evidence when he made his award.

Moreover, from the state of the record, it is not apparent that the parties required the arbitrator to apply any other standard than that of justice and good conscience in his resolution of the issues before him. *Bartlett*, 195 Ga. App. 845, at 848.

<sup>582</sup> 215 Ga. App. 669 (1994), at 671.

<sup>583</sup> 218 Ga. App. 193 (1995). In *Hundley*, the Georgia Court of Appeals ruled essentially that a finding by an arbitrator wholly unsupported by evidence of record was an abuse and a disregard of the law such as would justify its vacation. *Ibid*, at 195-196.

<sup>584</sup> 229 Ga. App. 336 (1997).

<sup>585</sup> 229 Ga. App. 485 (1997), at 486-487. The *Greenway Capital* case, however, cited the *Bartlett* rule as it had appeared in *Amerispec Franchise v. Cross*.

evidentiary support was unenforceable.<sup>586</sup> In rejecting the *ratio decidendi* of the lower court, the Supreme Court –whose decision was written by Justice Sears– emphatically ruled that, under Georgia law, arbitral awards could be vacated only on the grounds enumerated in the 1988 Georgia Arbitration Code and that common law grounds for such action had been eliminated by the adoption of the 1988 legislation:

The Arbitration Code sets forth four statutory grounds for vacating an arbitration award upon the application of a party subject to the award. The arbitration award shall be vacated if the court finds that the rights of the applying party were prejudiced by: (1) Corruption, fraud, or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping of the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or (4) A failure to follow the procedure of this [Code], unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.

Relevant case law states that these four bases are the exclusive grounds for vacating an arbitration award. The Arbitration Code requires a trial court to confirm an award upon the timely application of a party to the award, unless one of the statutory grounds for vacating or modifying the award is established. The Code specifically states that merely because the relief granted in the arbitration award "could not or would not be granted by a court of law or equity is not

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<sup>586</sup> 218 Ga. App. 193 (1995), discussed *supra*.

ground for vacating or refusing to confirm an award." In this regard, the power to vacate an arbitration award "should be severely limited in order not to frustrate the purpose of avoiding litigation by resorting to arbitration."<sup>587</sup>

Because Justice Sear's opinion in *Greene* had not explicitly banned the doctrine of "manifest disregard of law" from application by Georgia trial courts when called upon to confirm arbitral awards, some degree of confusion entered the Georgia case law on this point, especially in the Court of Appeals<sup>588</sup>; this issue continued to fester in Georgia's appellate courts until, finally, in its 2002 decision in *Progressive Data Systems, Inc. v. Jefferson Randolph Corporation*,<sup>589</sup> the Georgia Supreme Court ruled on the question, and ruled definitively:

... [U]nder *Greene*, an arbitration award can be vacated in only one of four statutory ways. See *Ralston v. City of Dahlonega*, 236 Ga. App. 386, 512 S.E.2d

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<sup>587</sup> *Greene v. Hundley*, 266 Ga. 592 (1996), at 594-595. (Footnotes omitted). The fundamental rationale of the court rested on the premise that the legislature's action in adopting a general arbitration code had effectively repealed any common law principles not confirmed by the legislative language, citing *Raymer v. Foster & Cooper Inc.*, 195 Ga. App. 200 (1990) and *Cotton States Mut. Ins. Co. v. Nunnally Lumber Co.*, 176 Ga. App. 232 (1985) in support of this principle.

<sup>588</sup> See, e.g., the decision of the Court of Appeals in *Haddon v. Shaheen & Company*, 231 Ga. App. 596 (1998) which was handed down after the Supreme Court's ruling in *Greene*:

We need not here decide whether *Greene*, supra, has precluded this Court from vacating arbitration awards by applying the "manifest disregard for the law" or "complete irrationality" tests to determine whether an arbitrator has exceeded his authority under OCGA § 9-9-13(b)(3). ... Suffice it to note that the appellate record reveals neither a "manifest disregard for the law" or "complete irrationality" by the arbitrator warranting vacation of the award.

*Haddon v. Shaheen & Company*, 231 Ga. App. 596, at 599. (Footnotes omitted).

<sup>589</sup> 275 Ga. 420 (2002).

300 (1999) (review must be confined to the four statutory grounds). That is because the Georgia Arbitration Code is in derogation of the common law and must be strictly construed. *Greene, supra* at 594, 468 S.E.2d 350.

Inasmuch as the Code does not list "manifest disregard of the law" as a ground for vacating an arbitration award, it cannot be used as an additional ground for vacatur. Nor can it be said that a "manifest disregard of the law" fits within the framework of the third statutory ground listed above-- overstepping of the arbitrator's authority. That ground only comes into play when an arbitrator determines matters beyond the scope of the case. *Threatt v. Forsyth County*, 250 Ga. App. 838, 841, 552 S.E.2d 123 (2001) (citing *Haddon v. Shaheen & Co.*, 231 Ga. App. 596, 499 S.E.2d 693 (1998)). It is not applicable where, as here, the issue to be decided, i.e., damages, is properly before the arbitrator.

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Our legislature set forth four statutory grounds for vacating an arbitration award. Significantly, it did not include "manifest disregard of the law" as one of those grounds. Whatever the merits of the "manifest disregard of the law" principle, we should not be so bold as to judicially mandate its use as an additional ground for vacatur, especially since, as noted above, our Arbitration Code is in derogation of the common law and must be strictly construed.<sup>590</sup>

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<sup>590</sup> *Ibid*, at 421. Justice Carley registered a strong dissent to the majority opinion in *Progressive Data Systems, ibid*, at 421-425, in which Justice Hunstein joined: "manifest disregard of the law" as a basis for vacatur of an arbitral award was an implicit defense which could be drawn from those expressly appearing in O.C.G.A. § 9-9-13 (2001 Supp.), they argued; moreover, in their view, it could not have been the intent of the legislature in adopting that statute to permit arbitrators consciously to evade applicable

Given the Supreme Court's emphatic insistence that the legislative will was the dominant analytical element in construing Georgia arbitration policy, it comes as little surprise that the next act in this unfolding drama took place in legislative chambers of the Georgia General Assembly in 2003, the first session of the legislature to be convened after the decision of the Georgia Supreme Court in *Progressive Data Systems*. Within days of the opening of the 2003 legislative session of the Georgia General Assembly, Representative Mary Margaret Oliver (D-Decatur) had introduced a draft of House Bill 91,<sup>591</sup> designed explicitly to work a reversal of the

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substantive law. With a touch of hyperbole, the dissent concluded:

The rationale for this almost universal acceptance of the "manifest disregard of the law" principle is that it is deemed a necessary component of the courts' "obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes." *Williams v. Cigna Financial Advisors*, *supra* at 761(II). "A primary advantage of arbitration is the expeditious and final resolution of disputes by means that circumvent the time and expense associated with civil litigation." *Greene v. Hundley*, *supra* at 597(3), 468 S.E.2d 350. However, that advantage is surely lost if the judiciary permits arbitrators to circumvent the applicable law wilfully. No reasonable potential litigant would select arbitration in lieu of a lawsuit if there is a possibility that the dispute will be resolved by a final award issued by an arbitrator who has judicial approval to ignore controlling legal principles. Therefore, to the extent that *Greene* bars acceptance of a "manifest disregard of the law" as a valid ground for vacating an award, it discourages arbitration as an alternate method of dispute resolution and places Georgia outside the mainstream of persuasive authority. Accordingly, I would overrule the holding in *Greene* that OCGA § 9-9-13(b) provides the exclusive grounds for vacating an arbitration award, and adopt "manifest disregard of the law" as a viable basis for doing so.

*Ibid*, at 477-478.

<sup>591</sup> House Bill 91 was clearly linked in the mind of its author with a perceived need to protect Georgia consumers from overbearing arbitrators and from large corporations. To this extent, HB 91 can be seen in the context of a broader national movement which sees protection of consumers in limitations on the unfettered right to resort to arbitration. *See*

position of the Georgia Supreme Court adopted in *Progressive Data Systems* by amending O.C.G.A. § 9-9-13 (2001 Supp.) to authorize Georgia courts to vacate awards when the arbitrator had manifestly disregarded the law in reaching that award.<sup>592</sup>

The adoption in Georgia of the amended statute permitting vacatur of awards for an arbitrator's manifest disregard of the law drew immediate response, much of that from the arbitration community in the state of a hesitant and qualified nature. Criticism of the lack of definition in the statute; potential abuse by courts prepared to characterize any mere mistake of law as a manifest disregard of the prevailing legal rule; increased expense in arbitration flowing from the need for more exact records of proceedings; and enhanced burdens on arbitrators who would be under increased pressure to develop elaborate records of arbitral proceedings and to

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John F. Dienelt and Jerome D. Pinn, *State Efforts To Limit Arbitration*, 11 FRANCHISE L. J. 104 (1992). In her discussion of the bill on the floor of the Georgia House on February 12, 2003, she stated that "I think over half our Georgian citizens right now have submitted to arbitration, knowingly or unknowingly" and that, "... as a Visa card owner I have submitted contractually to arbitration instead of the rights of a citizen to go to court. This is a very significant phenomenon and our businesses, particularly, are benefitting from this opportunity to avoid traditional litigation." See the videotape transcript of the discussion of HB 91 found at <[http://www.georgia.gov/00/article/0,2145,4802\\_0\\_11795314,00.html](http://www.georgia.gov/00/article/0,2145,4802_0_11795314,00.html)>, timer segment 1:16:15-1:17:50. I am indebted to Mr. David Boohaker for the typewritten version of this legislative record which he made available to me in his unpublished paper, "Georgia Arbitration and Manifest Disregard of the Law (Fall, 2003), at 14-15. See also Jonathan Ringel, *Arbitrators May Lose Right To Ignore Law*, FULTON COUNTY DAILY REPORT, Volume 3, No. 28, March 23, 2003 (" 'I'm very optimistic,' Oliver said, adding that it would be wrong for the General Assembly to allow arbitrators knowingly to violate the law when many consumers are required to arbitrate their disputes.' ").

<sup>592</sup> When finally adopted on April 25, 2003, as a part of House Bill 792, Representative Oliver's bill added a fifth basis for the vacation of arbitral awards to the four already present in O.C.G.A. § 9-9-13 (2001 Supp.), inserting the provision that the courts could vacate an award infected by "the arbitrator's manifest disregard of the law." See 2003 Ga. Laws, 820, 821 § 2, 828 § 9, *codified* as O.C.G.A. § 9-9-13 (5) (2003).

provide more detailed expositions of the legal foundations for awards, were all among the sources of anxiety cited in opposition to the new law.<sup>593</sup>

*The National Dimension: Georgia's "Manifest Disregard of Law" Statute as a Permissible Defense to the Enforcement of Domestic and Foreign Arbitral Awards in Federal Judicial Procedures*<sup>594</sup>

Among the many concerns voiced regarding the adoption of “manifest disregard of the law” as a statutory basis for the vacatur of an arbitral award under Georgia state law were those relating to the interaction of that statutory standard with analogous provisions of federal legislation, especially the provisions of § 10 of the Federal Arbitration Act of 1925 which do not, of course, explicitly incorporate any such defense or basis for vacatur in their terms. Further discomfort centers on the fact that “manifest disregard of the law” does not appear as one of the enumerated defenses to the enforcement of arbitral awards set forth in Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,

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<sup>593</sup> See, e.g., Douglas H. Yarn, *Are Arbitrators Bound to Follow the Law? Vacating Arbitral Awards for “Manifest Disregard” of Law in Georgia*, 10<sup>th</sup> Annual ADR Institute and the 2003 Neutrals Conference: Celebrating 25 Years of ADR: A Glance Back A Look Forward (Lake Lanier Island, Georgia, November 20-22, 2003), at Vol. I, Chapter 3; see also, in the same volume at Chapter 3-B, John Hinchey and Thomas V. Burch, *Georgia General Assembly Adopts “Manifest Disregard” As A Ground for Vacating Arbitration Awards: How Will Georgia Courts Treat the New Standard?*; and Allgood & Lanier, at 6-8. As of early April, 2004, O.C.G.A. § 9-9-13 (5) had not been construed or applied by any Georgia appellate court, although its adoption had been referenced in *Marchelletta v. Seay Construction Services, Inc.*, 2004 WL 26729 (2004)(Ga. Ct. of Appeals).

<sup>594</sup> This discussion, prepared by the author for use in this general review of Georgia arbitration policy, was included as his contribution to the latter portion of Allgood & Lanier, at 8-14.

subsequently incorporated into domestic United States law as Chapter Two of the Federal Arbitration Act.<sup>595</sup>

Anxieties respecting the potential clash of Georgia state and federal law over the new statutory provision with respect to the vacatur or enforcement of *domestic* arbitration awards governed by Chapter One of the Federal Arbitration Act may be exaggerated since there does not, under current federal law on this subject, appear to be any fundamental inconsistency between the new Georgia statutory standard and prevailing federal case law.<sup>596</sup> At least since

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<sup>595</sup> The same concern could be registered with respect to the compatibility of Georgia's new "manifest disregard of the law" statute and the defenses to the enforcement of arbitral awards recited in the Inter-American Convention on International Commercial Arbitration of 1975, incorporated into United States law in 1990 as Chapter Three of the Federal Arbitration Act. *See* 9 U.S.C. § 301, Pub. L. 101-369, § 1, Aug. 15, 1990, 104 Stat. 448. That Convention, like the earlier United Nations Convention, omits any "manifest disregard of the law" defense in its terms.

<sup>596</sup> ... [E]very ... circuit [other than the Eleventh] except the Fifth (which has declined to adopt any non-statutory grounds for vacating arbitration awards), has expressly recognized that "manifest disregard of the law" is an appropriate reason to review and vacate an arbitration panel's decision. *See Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234 (1st Cir.1995); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9 (2d Cir.1997); *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376 (3d Cir.1995); *Upshur Coals Corp. v. United Mine Workers of America, Dist. 31*, 933 F.2d 225 (4th Cir.1991); *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844 (6th Cir.1996); *National Wrecking Co. v. International Broth. of Teamsters, Local 731*, 990 F.2d 957 (7th Cir.1993); *Lee v. Chica*, 983 F.2d 883 (8th Cir.), *cert. denied*, 510 U.S. 906, 114 S.Ct. 287, 126 L.Ed.2d 237 (1993); *Barnes v. Logan*, 122 F.3d 820 (9th Cir.1997); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631 (10th Cir.1988); *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 n. 2 (5th Cir.1993)(rejecting any non-statutory grounds for vacating arbitration awards). . . .

In [the Eleventh] circuit, we have not found it necessary to expressly adopt this ground, as it was unnecessary for the resolution of the cases in which it was discussed.



1997, the Eleventh Circuit Federal Court of Appeals has admitted of the possibility of “manifest disregard of law” as a common law defense to award enforcement. In that year, Judge Barkett, writing for a unanimous panel of that Circuit Court of Appeals,<sup>597</sup> brought the Eleventh Circuit into line with other federal circuit courts by explicitly approving of *manifest disregard of law* as a basis on which to deny enforcement of arbitral awards in federal district court procedures within the circuit. Writing in *Montes v. Shearson Lehman Brothers, Inc.*,<sup>598</sup> he announced the court’s conclusion “that a manifest disregard for the law, in contrast to a misinterpretation,

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*Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1460 (1997).

<sup>597</sup> Judge Carnes felt constrained to register a concurring opinion in the decision in order to insure that the narrow parameters of the doctrine as adopted into Eleventh Circuit common law under the Federal Arbitration Act would not be, by misinterpretation, expanded beyond the limited scope the court intended. In *Montes*, the arbitral panel was urged by the respondent’s counsel explicitly to disregard the provisions of the Federal Labor Standards Act which governed the claimant’s demand for unpaid back wages. The panel’s award in favor of the respondent stated no reasons for its decision. In these circumstances, Judge Carnes wrote:

I concur in Judge Barkett’s fine opinion and write separately only to emphasize how narrowly the decision in this case is limited to the unusual facts presented. Those facts are that: 1) the party who obtained the favorable award had conceded to the arbitration panel that its position was not supported by the law, which required a different result, and had urged the panel not to follow the law; 2) that blatant appeal to disregard the law was explicitly noted in the arbitration panel’s award; 3) neither in the award itself nor anywhere else in the record is there any indication that the panel disapproved or rejected the suggestion that it rule contrary to law; and 4) the evidence to support the award is at best marginal. The Court does not imply that it would find a manifest disregard of the law based on anything less than all of those factors. For example, the fact that an attorney misstated the law to the arbitration panel, as attorneys sometimes do, even if there was only weak evidence to support the award, will not justify a conclusion that the award resulted from a manifest disregard of the law.

*Ibid*, at 1464.

<sup>598</sup> 128 F.3d 1456 (1997).

misstatement or misapplication of the law, can constitute grounds to vacate an arbitration decision.<sup>599</sup> The court's insistence that this common law defense is a narrow and constrained one seems borne out by the experience of the court since the announcement of the *Montes* decision in 1997: since that time, the Eleventh Circuit has never on a single occasion sustained this defense in any case coming before it.<sup>600</sup>

Although HB 91 was explicitly drafted with respect to issues in domestic arbitration, the terms of the statute as adopted by the legislature on April 25, 2003, have a decided significance in the arena of international arbitration where it will present the courts with peculiar and acute interpretive challenges. This was perhaps not fully appreciated when "manifest disregard of law" was grafted onto the terms of Georgia's Arbitration Code as it had been adopted in 1988.<sup>601</sup>

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<sup>599</sup> *Ibid*, at 1461-1462.

<sup>600</sup> It has had, however, several opportunities to do so. See *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007 (1998); *Weaver v. Florida Power & Light Co.*, 172 F.3d 771 (1999); *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (2000); and *University Commons-Urbana, Ltd., v. Universal Constructors, Inc.*, 304 F.3d 1331 (2002). In the *Scott*, *Brown*, and *University Commons-Urbana* decisions, the Eleventh Circuit specifically passed on the allegations of "manifest disregard of law" in those cases and found that the facts did not establish the presence of the defense. In *Weaver*, the appeals court reversed an injunction issued by the lower district court against the prosecution of an arbitration. Finding that this constituted an abuse of its discretion because the arbitration represented an adequate remedy at law, the court remanded the matter to the trial court for the dissolution of the improvidently granted injunction. See *Weaver v. Florida Power & Light Co.*, 172 F.3d 771, 774 (1999). On the federal matrix of domestic arbitration cases invoking "manifest disregard of the law" as a basis for the vacatur of an award or a defense to its enforcement, see also John W. Hinchey and Thomas V. Burch, *Georgia General Assembly Adopts "Manifest Disregard" as a Ground for Vacating Arbitration Awards: How Will Georgia Courts Treat the New Standard?*, 9 GEORGIA BAR JOURNAL 11, 12-14 (2004).

<sup>601</sup> HB 91 was adopted as an amendment to the provisions of O.C.G.A. § 9-9-13 (2001 Supp.), the statutory bases for the vacation of arbitral awards set forth in Part I of the Georgia Arbitration Code, adding "manifest disregard of the law" to those already provided by the law as bases for an application to vacate such awards. The terms of the unamended 1988 statute were in turn brought forward from the 1978 Georgia

In the aftermath of the Second World War, many international trade analysts attributed the advent of that global conflict, in part, to the absence of effective international trade control mechanisms, particularly in the years after the end of the First World War. These pointed especially to the lack of any internationally recognized forum for the resolution of commercial trade disputes as one of the significant causes in the breakdown in trade relations prior to the outbreak of military conflict in 1939.<sup>602</sup> The result in the years after 1945 was a concerted effort

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Construction Arbitration Code which was, at least as far as its enumerations of grounds on which to vacate arbitral awards, rooted very firmly in the 1925 Federal Arbitration Act grounds for vacation of awards found in 9 U.S.C.A. § 10. Part 2 of the Georgia Arbitration Code (governing “International Transactions,” defined in O.C.G.A. § 9-9-13 [2001 Supp.] as involving a non-United States party or otherwise being substantially related to commercial activity outside the United States) provides that “[a]n arbitration award irrespective of where it was made, on the basis of reciprocity, shall be recognized as binding and shall be enforceable in the courts of this state subject to the grounds for vacating an award under Part 1 of this article [O.C.G.A. § 9-9-13] and providing that the award is not contrary to the public policy of this state with respect to international transactions.” O.C.G.A. § 9-9-42 (2001 Supp.). To this extent, this section does little more than restate the domestic bases for award vacation as grounds to set aside those arising from international transactions as well, in addition to make the explicit addition of the public policy defense authorized by Article V(2)(b) of the New York Convention (incorporated into United States law by 9 U.S.C.A. § 207), discussed *infra*. The statute goes on, however, to provide that “reciprocity in the recognition and enforcement of foreign arbitral awards shall be in accordance with applicable federal laws, international conventions, and treaties,” raising significant interpretive issues. Does this language mean that reciprocal enforcement of the designated arbitral awards will be controlled exclusively by federal law to the displacement of Georgia law, including that which is not contrary to or inconsistent with preemptive federal standards? Is this rule to be limited to foreign arbitral awards, to the exclusion of the non-domestic awards which are within New York Convention coverage under both Article I(1) of the Convention and under 9 U.S.C.A. § 202? None of this is wholly clear, and no case law has been handed down by the Georgia appellate courts to clarify these questions since the adoption of this section of the 1988 Georgia Arbitration Code.

<sup>602</sup> A summary overview of international trade history after the First World War, emphasizing the role of the International Chamber of Commerce (ICC) in the development of post-1945 trade institutions (including its International Court of Arbitration) can be accessed at <[http://www.iccwbo.org/home/menu\\_what\\_is\\_icc.asp](http://www.iccwbo.org/home/menu_what_is_icc.asp)>.

on the part of the international trade community, spearheaded in major part by the International Chamber of Commerce in Paris, to achieve globally accepted trade standards to facilitate international exchange and commerce.<sup>603</sup> One of the major facets of this initiative was the improvement of the conditions under which international commercial arbitration was conducted, and in this respect two objectives became paramount: first, a multilateral understanding that arbitral awards rendered in one nation would be legally (and with an absolute minimum of obstruction) enforceable in another; and, secondly, the unification (or at least a general harmonization) of most of the procedural and substantive conditions under which international commercial arbitrations would take place. In this latter respect, particularly important was the elimination of local or parochial barriers, both procedural and substantive, to the recognition of arbitration agreements and the mutual enforcement of arbitration awards in international commerce.<sup>604</sup>

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<sup>603</sup> On the leadership of the ICC in consolidating the function of arbitration in international trade dispute resolution, especially before the accession of the United States to the New York Convention in 1970, see Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773 (2002), especially at 781, and William W. Park, *Award Enforcement Under the New York Convention*, 688 PLI/LIT 573 (2003), at 577-578. For a quick overview of ICC arbitration and aspects of its history, see the remarks (if now a bit dated) of Michel Gaudet reported in *Choosing a Forum for International Commercial Arbitration*, 76 AM. SOC'Y INT'L L. PROC. 166 (1982), at 172-175. A classic statement respecting the leadership of the ICC in the development of the New York Convention is ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981). See also Cindy Silverstein, *Comment, Iran Aircraft Industries v. Avco Corporation: Was a Violation of Due Process Due?* 20 BROOK. J. INT'L L. 443 (1994), especially at 451-453.

<sup>604</sup> See generally, Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003), especially at 700-701 (footnotes omitted, but quoting U.N. Doc. No. E/Conf. 26/SR.25, at 2 [1958]):

The principal vehicle for the recognition and enforcement of arbitral

Perhaps the greatest single milestone in the emergence of internationally acknowledged standards for the conduct of arbitrations around the globe was achieved in 1958 with the conclusion of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>605</sup> a treaty which established extremely important principles both defining the legal requirements for recognition of arbitration agreements<sup>606</sup> and limiting the defenses which

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agreements and awards is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention. With over 130 signatories, the New York Convention enjoys extraordinary application and is one of the hallmarks for the facilitation of international commerce. The purpose of the New York Convention is to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." According to the drafters of the New York Convention, two of its principal achievements were that it "gave a wider definition of the awards to which the Convention applied" and it "reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply."

<sup>605</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10., 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, *codified in* 9 U.S.C.A. §§ 210-08 (1970), hereinafter, "NYC." Negotiated and concluded in New York City, this important Convention is often identified simply as the "New York Convention."

<sup>606</sup> Under the terms of the New York Convention, all that is necessary for an arbitral award to fall within the terms of this supportive treaty is that there be a written agreement by the parties to undertake to submit to arbitration all or any present or future differences which exist between them "in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." *See* NYC, Art. II (1). The scope of the Convention extends to awards rendered in the territory of a foreign nation, as well as to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." NYC, Art. I (1). When the United States acceded to this treaty in December 1970, it did so subject to two reservations which are, more than three decades later, still in force: the United States will extend Convention coverage only to arbitration awards which are of a commercial nature and, in addition, only to those foreign awards which are rendered on the territory of another nation which has acceded to the New York Convention. *See* FAA, § 202 ("An arbitration agreement ... arising out of a legal relationship, whether contractual or not,

signatory nations could, through their national laws, make available to thwart (or set aside) the enforcement of arbitral awards subject to the Convention. This latter feature –the strict limitation on the defenses which could lawfully be used to block the enforcement of an award covered by the Convention– was regarded as of critical significance, since it assured the international commercial community that arbitration awards would not be frustrated at the enforcement stage by local, and sometimes obscure, legal provisions devised to protect the local party.<sup>607</sup>

The award enforcement defenses authorized by the terms of the New York Convention –and there are only seven of these<sup>608</sup>– are quite circumscribed: awards will not be enforced under the treaty if it is shown that a party lacked capacity or the agreement was for some other reason

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which is considered commercial ...” is enforceable under Chapter Two of the Federal Arbitration Act); *see also* Declaration of the United States upon Accession, reprinted in 9 U.S.C. § 201 note at n. 29 (1994), which stipulates that “[t]he United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.” Both of these reservations were authorized under the Convention, *see* NYC, Art. I (3), and many other nations have taken advantage of them as well.

<sup>607</sup> On the Convention and its policies generally, together with a specific discussion of the arguments, *pro* and *con*, on the merits of the Convention mechanisms to insure an internationalized interpretation of its provisions and offering a challenge to aspects of the accepted wisdom that treatment under the domestic chapter (Chapter One) of the Federal Arbitration Act is not as advantageous to foreign awards as is Chapter Two implementing the New York Convention, *see* Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213 (1996).

<sup>608</sup> The Convention’s defenses to the enforcement of arbitral awards covered by it are all grouped in Article V of the treaty. This article can be seen as a conceptual counterbalance to the expansive provisions of Article I: where the treaty’s scope and reach are broad and encompassing under Article I of the Convention, the available defenses to award enforcement under Article V are intentionally narrow and constrained, thus assuring the widest possible play for enforceability of awards in the international trade and commerce arena.

invalid<sup>609</sup>; if inadequate notice was afforded a party of the appointment of an arbitrator or of the proceedings themselves, or where parties were otherwise unable to present their case<sup>610</sup>; if the award was *ultra vires* on the part of the arbitrators who proceeded to decide matters not submitted to them<sup>611</sup>; if the composition of the arbitral panel was not in accord with either local law or the agreement of the parties<sup>612</sup>; or if the award, at the time its enforcement is sought, is not binding on the parties or has been set aside or suspended by a court authorized to do so.<sup>613</sup> In addition, these five procedural defenses are supplemented by two substantive ones: no award will be enforced under the New Convention if it addresses a subject matter which is not capable of settlement by arbitration under the law of the nation of enforcement<sup>614</sup> or if the award is somehow offensive to the public policy of the nation called upon to enforce it.<sup>615</sup>

Manifest disregard of law is not among the enumerated defenses of the Convention; nor does it appear in the listing of defenses to the enforcement of arbitral awards listed in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985.<sup>616</sup> Not only is the manifest disregard defense wholly absent

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<sup>609</sup> NYC, Article V(1)(a).

<sup>610</sup> NYC, Article V(1)(b).

<sup>611</sup> NYC, Article V(1)(c).

<sup>612</sup> NYC, Article V(1)(d).

<sup>613</sup> NYC, Article V(1)(e).

<sup>614</sup> NYC, Article V(2)(a).

<sup>615</sup> NYC, Article V(2)(b).

<sup>616</sup> This Model Law is substantively integrated with the New York Convention and essentially provides for the same bases for the refusal of award enforcement as does the treaty. Now almost twenty years old, the Model Law has been substantially adopted as national law in a growing number of nations, among them, Australia, Canada, Germany, Greece, Hong Kong Special Administrative Region of China, Hungary, India, Mexico,

from these treaty and statutory provisions, the terms of both of those instruments provide cogent evidence that the defenses enumerated in the Convention were the only defenses contemplated and that no others were to be interpolated into them.<sup>617</sup> Moreover, the limited grounds for defense enumerated in them are –in the virtually unanimous view of American courts, state and federal, which have addressed the issue– to be given the narrowest of constructions in order to make the enforcement of international arbitral awards as liberal as possible.<sup>618</sup>

The availability of the “manifest disregard of the law” defense in actions under the New York Convention remains clouded. Early on after the adoption of the treaty, United States courts

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New Zealand, Nigeria, Republic of Korea, Russian Federation, Singapore, Ukraine, and (within the United Kingdom of Great Britain and Northern Ireland) Scotland. Among jurisdictions within the United States, California, Connecticut, Illinois, Oregon and Texas have adopted legislation based largely on the UNCITRAL Model Law. *See* GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: CASES AND MATERIALS* (2d, Ed.) (2001), at 30-31. Georgia’s International Transaction Arbitration Code is heavily influenced by the Model Law.

<sup>617</sup> Article V(1) of the New York Convention states, for instance, that the “[r]ecognition and enforcement of the [arbitral] award may be refused, at the request of the party against whom it is invoked, *only if* that party furnishes to the competent authority where the recognition and enforcement are sought, proof” that one of the enumerated defenses exists. (Emphasis supplied). 9 U.S.C.A. § 207, incorporating the Convention’s Article V defenses into United States law, stipulates that “[t]he [U.S.] court shall confirm the award *unless it finds one of the grounds* for refusal or deferral of recognition or enforcement of the award *specified in the said Convention.*” (Emphasis supplied).

<sup>618</sup> In *Parsons Whittemore Overseas Co., Inc. v. Société Générale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974), one of the earliest cases decided by a federal circuit court following the United States’ accession to the New York Convention, the Second Circuit Court of Appeals counseled that the defenses of the Convention were to be given a restrictive interpretation and application by the courts of the United States in order to implement the intention of the United States in joining the Convention to facilitate the enforcement of international agreements and awards to the maximum extent and not to permit local or parochial concerns to stand in the way of this general objective. The court, in writing of the public policy defense authorized by the treaty, emphasized that the defenses of the Convention were not to be utilized as “parochial device[s] protective of national political interests [which] would seriously undermine the Convention’s utility.” *Parsons Whittemore Overseas Co., Inc.*, at 974.



split over the issue, some courts rejecting it as a defense in cases within the scope of the Convention,<sup>619</sup> others affording it some measure of play.<sup>620</sup> The influential Second Circuit has now ruled on the basis of its construction of technical language in the Convention that, although the manifest disregard defense may not be raised against a *foreign* arbitral award (*i.e.*, one rendered on the territory of another contracting State), it may nevertheless be raised to block the enforcement of a “*nondomestic* award,” one which falls under the Convention’s terms but is made in the United States or under United States law.<sup>621</sup> Hence, it would appear under this reasoning that manifest disregard of the law will never be permitted, because of the operation of the New York Convention, as a defense to the enforcement of a foreign award made abroad, while there remains a better than theoretical possibility that such a defense might well be

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<sup>619</sup> *See, e.g.*, *Brandeis Intsel, Ltd. v. Calabrian Chem. Corp.*, 656 F. Supp. 160 (S.D.N.Y.1987). *Cf. Biotronik Mess- und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co.*, 415 F. Supp. 133 (D.N.J. 1976); and *Fotochrome, Inc. v. Copal Co. Ltd.*, 517 F. 2d 512 (1975) (the Convention defenses are exhaustive). *See also Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936 (2001), at 955, fn 19:

. . . . it is likely that disregard of a principle of law is not a valid basis for avoiding confirmation under the Convention. *See M & C Corp.*, 87 F.3d at 851 n. 2 (“Whatever may be meant by the manifest disregard doctrine applicable in domestic arbitration cases, it is clear that such a doctrine does not rise to the level of a violation of public policy that is necessary to deny confirmation of a foreign arbitral award.”); *RAKTA*, 508 F.2d at 977 (“Both the legislative history of Art. V and the statute enacted to implement the United States’ accession to the Convention, are strong authority for treating as exclusive the bases set forth in the convention for vacating an award.”).

<sup>620</sup> *See, e.g.*, *American Construction Machinery & Equipment Corp. Ltd. v. Mechanised Construction of Pakistan, Ltd.*, 659 F. Supp. 426 (1987).

<sup>621</sup> *See Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15 (2d Cir. 1997), cert. denied, 522 U.S. 1111, 118 S. Ct. 1042, 140 Law. Ed. 2d 107 (1998); *see also Ludgate Insurance Co. Ltd. v. Banco de Seguros del Estado*, 2003 WL 443584 (S.D.N.Y.)

admitted with respect to a Convention award made in the United States. This result will obtain, it would seem, regardless of the presence of the manifest disregard of law grounds for vacatur in Georgia law.

In assessing the general value and feasibility of including a “manifest disregard of law” provision and a conceptually related defense based on violations of public policy in the catalogue of defenses to award enforcement and bases for award vacatur enumerated in the Revised Uniform Arbitration Act [RUAA], the Commissioners on Uniform State Laws considered but rejected such proposals:

There are reasons for the RUAA not to embrace either the "manifest disregard" or the "public policy" standards of court review of arbitral awards. The first is presented by the omission from the FAA of either standard. Given that omission, there is a very significant question of possible FAA preemption of a such a provision in the RUAA, should the Supreme Court or Congress eventually confirm that the four narrow grounds for vacatur set out in Section 10(a) of the federal act are the exclusive grounds for vacatur. The second reason for not including these vacatur grounds is the dilemma in attempting to fashion unambiguous, "bright line" tests for these two standards. The case law on both vacatur grounds is not just unsettled but also is conflicting and indicates further evolution in the courts. As a result, the Drafting Committee concluded not to add these two grounds for vacatur in the statute. A motion to include the ground of "manifest disregard" in Section 23(a) [of the RUAA] was defeated by the

Committee of the Whole at the July, 2000, meeting of the National Conference of Commissioners on Uniform State Laws.<sup>622</sup>

Writing in terms more elegant if perhaps not so technical as those of the Commissioners on Uniform State Laws, William Park nonetheless found that the inevitable effect of the application of the manifest disregard defense to the enforcement of an arbitral award is clear:

The availability of a right to attack awards for "manifest disregard" gives losing parties the opportunity to disrupt the arbitral process, whatever the ultimate outcome of a challenge might be. Hanging like a sword of Damocles over the arbitration, "manifest disregard" serves as a vehicle for attempts to renege on the bargain to have a dispute decided by arbitrators. The result is to give the United States a competitive disadvantage compared to arbitral venues where judicial intervention is limited to matters related to fundamental procedural integrity.<sup>623</sup>

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<sup>622</sup> See "Comment on the Possible Codification of the 'Manifest Disregard of the Law' and the 'Public Policy' Grounds For Vacatur," Commissioners on Uniform State Laws, reprinted in the official annotation to N.C.G.S.A. § 1-569.23. North Carolina law does not include the "manifest disregard of law" defense in its enumeration of matters available as a basis on which to vacate arbitral awards but, as a result of recent legislation in 2003, the State of Texas does include such a provision in its Residential Construction Arbitration Code: "... on application of a party, a court shall vacate an award in a residential construction arbitration upon a showing of manifest disregard for Texas law." See § 438. 001, Vernon's Texas Code Ann. [Texas Residential Construction Commission Act, Enforceability of Residential Construction Arbitration Awards, Grounds for Vacating Award]. See also Acts 2003, 78<sup>th</sup> Leg., ch. 458, § 1.01, eff. Sept. 1, 2003. It would seem then that Georgia's statute has the distinction of being the first in the nation to include "manifest disregard of the law" as a statutory basis for the vacatur of an arbitral award, but that the legislation of Texas comes in, by a matter of only two months, a very close second.

<sup>623</sup> William W. Park, *Award Enforcement Under the New York Convention*, 688 PLI/Lit 573 (2003), at 594.

CHAPTER THREE  
A CONCLUDING NOTE: CHALLENGES TO ARBITRATION POLICY IN GEORGIA AT  
THE DAWN OF A NEW MILLENNIUM

The rapid expansion of arbitral devices, procedures, and mechanisms experienced in the colony and state of Georgia throughout the late eighteenth, nineteenth and twentieth centuries provides clear and irrefutable historical evidence of their popularity and success in the first two and a half centuries of Georgia's existence.<sup>624</sup> As this survey has indicated, entities as widely diverse in their organization and objectives as churches, banks, railroads, mining companies, canal and plank road companies, and chambers of commerce, as well as cities, counties, and the state itself, lent powerful impetus to the evolution and development of arbitral techniques for the extrajudicial resolution of those disputes which, inevitably it seems, arose in the course of their

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<sup>624</sup> Georgia's *penchant* for dispute resolution outside of the conventional courthouse has been, as demonstrated in this survey, a factor in the life of the colony and state since the earliest colonial period, and Georgia's readiness to experiment with new and innovative forms of alternative dispute resolution, even those beyond traditional arbitration, continues apace at the beginning of the twenty-first century. Court-referred alternative dispute resolution programs proliferated in Georgia beginning as early as the late 1970s. These were outgrowths of experience in the state with private initiatives which later associated themselves with trial-level courts around Georgia to offer access to alternative dispute resolution mechanisms. The Justice Center of Atlanta, Inc., is perhaps the oldest and best-known of these. The American Arbitration Association opened an Atlanta office at about the same time. Other initiatives such as the Neighbor to Neighbor Mediation Center of Savannah/Chatham County and the Civil Arbitration Program of Fulton County Superior Court introduced new forms of mediation and mandatory, nonbinding arbitration in areas which had previously had little experience with such innovations. A Joint Commission on Alternative Dispute Resolution was established in the fall of 1990, co-chaired by Chief Justice Harold Clarke of the Georgia Supreme Court and the president of the State Bar of Georgia, in order to explore the possibilities offered by court-annexed mediation programs to enhance existing techniques in alternative dispute resolution. The history of these developments in extrajudicial dispute resolution in Georgia is detailed in Edith B. Primm, *Alternative Dispute Resolution, GEORGIA PROCEDURE, CIVIL PROCEDURE: SPECIAL REMEDIES AND PROCEEDINGS* (1995), at 485-491.

activities. Nonetheless, the end of the twentieth and beginning of the twenty-first centuries have witnessed both in Georgia and throughout the United States gathering storms in disparate areas of arbitral practice and theory, tempests which threaten to undermine the very foundations of the theoretical and doctrinal bases upon which state arbitration policy has been so carefully and painstakingly constructed over the preceding epochs.<sup>625</sup> Illustrative of these has been an emerging consumer challenge to the integrity and utility of the arbitral process and a growing public skepticism, at least in some quarters, of the inherent quality of the justice available through arbitration implicated in the enactment of state statutory initiatives to restrict arbitration procedures, on the one hand, and the looming threat of total cooption of state initiatives in the arbitral process by parallel federal legislation (particularly the Federal Arbitration Act of 1925<sup>626</sup>), on the other. The former is implicated in the recent adoption by the Georgia General Assembly, discussed above, of an amendment to the 1988 Georgia Arbitration Code<sup>627</sup> providing the statutory defense of “manifest disregard of the law” as an additional basis upon which the vacatur of an arbitral award may be had in this state; the latter –the substantial risk of the loss of state independence and autonomy in arbitral policy emerging as the consequence of twin forces,

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<sup>625</sup> No public clash over arbitration has drawn the spotlight of national attention to quite the same degree as has that which is ongoing in the State of Alabama. *See* Stephen J. Ware, *Money, Politics and Judicial Decisions: a Case Study of Arbitration Law in Alabama*, 30 *CAP. U. L. REV.* 583 (2002).

<sup>626</sup> Federal Arbitration Act, ch. 392, §1, 62 Stat. 669 (1947), now codified as 9 U.S.C. §§ 1-16 [sometimes hereinafter, Federal Arbitration Act of 1925, Federal Arbitration Act, or “FAA.”].

<sup>627</sup> O.C.G.A § 9-9-13 (b) (5), as amended on April 25, 2003, by HB 792 (2003 Ga. Laws, Act 363, § 2), signed by Governor Sonny Perdue on June 4, 2003, and effective as law in Georgia on July 1, 2003. This amendment to the 1988 Code is discussed at more length, *supra*, in Chapter Two, Section 6, of this survey, “The 2003 Amendment to the 1988 Georgia Arbitration Code: Manifest Disregard of the Law.”

the “federalization” of arbitration in the United States and expansive understandings of the doctrine of federal preemption of state law— is reviewed here as a conclusion to this survey of arbitration policy in the state of Georgia.

### Section 1. The Doctrine of Federal Preemption and the Autonomy of Georgia Arbitration Policy

The utility and frequency of arbitration in the colonial and early republican eras of Georgia’s legal history belie to some extent the open rejection (or, at best, the begrudging acceptance) which arbitration received at the hands of both English and American courts throughout the eighteenth and nineteenth and centuries. The traditional common law hostility towards arbitration generally is, of course, the stuff of legend: until well into the beginning decades of the twentieth century, the courts in the United States (both state and federal) demonstrated an abiding distaste for the arbitral process, premising this profound antipathy on the proposition, *inter alia*, that arbitration ousted the courts of their proper role and subject matter jurisdiction.<sup>628</sup> On this logic, American courts customarily refused to enforce many

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<sup>628</sup> Judge Jerome Frank mused on the origin of this doctrine in *Kulukundis Shipping Co., S.A. v. Amtrog Trading Corp.*, 126 F.2d 978, 982 (1942) (footnotes omitted):

... It has been well said that 'the legal mind must assign some reason in order to decide anything with spiritual quiet.' And so, by way of rationalization, it became fashionable in the middle of the 18th century to say that such [arbitration] agreements were against public policy because they 'oust the jurisdiction' of the courts. But that was a quaint explanation, inasmuch as an award, under an arbitration agreement, enforced both at law and in equity, was no less an ouster; and the same was true of releases and covenants not to sue, which were given full effect. Moreover, the agreement to arbitrate was not illegal, since suit could be maintained for its breach. Here was a clear instance of what Holmes called a 'right' to break a contract and to substitute payment of damages for non-performance ...

arbitration agreements on the basis that such agreements were invalid as against public policy; a slightly different logic led them to conclude, but with essentially the same result, that arbitration agreements were revocable by the parties and hence, could not be enforced against one who retracted his agreement to arbitrate before the entry of an arbitral award; and, finally, some courts in the United States premised their refusal to enforce arbitration agreements and awards on the simple proposition that such agreements were unenforceable as a matter of law.<sup>629</sup> The case reports of the United States are littered with the evidence of this enduring judicial hostility towards arbitration, a hostility so deeply ingrained that it took a major statutory revolution, beginning in the first decades of the twentieth century, to undo the work of generation after generation of common law judges.<sup>630</sup>

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On the old “ouster” doctrine in Georgia case law, *see* *Leonard v. House*, 15 Ga. 473 (1854) and *Parsons v. Ambos*, 121 Ga. 98 (1904); *see also* *Millican Electric Co. v. Fisher*, 102 Ga. App. 309 (1960), discussed *supra*. Under Georgia’s former policy, arbitration agreements were held, consistent with the national view, void and unenforceable as against public policy because they attempted to oust the courts of jurisdiction. However, this rule was applicable only where there was an agreement to arbitrate *all questions* which might arise in the execution of a contract, both as to liability and to loss. If the contract contained an arbitration provision relating only to such “incidentals” as price, value, measure, quantity, quality, classification and similar issues, the arbitration provisions in such contracts were regarded by Georgia courts as valid. *See* *Manderson & Associates, Inc. v. Gore*, 193 Ga. App. 723, 731 (1989).

<sup>629</sup> A good review of the origins of and grounds for the English enmity towards arbitral processes, and the various forms it took, is rehearsed in *Kulukundis Shipping Co., S.A. v. Amtrog Trading Corp.*, 126 F.2d 978, 982-984 (1942). *See also* THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 49 (2000).

<sup>630</sup> Judge Frank, in the *Kulukundis Shipping Company* decision, sought to clarify the foundation for this hostility as well:

An effort has been made to justify this judicial hostility to the executory arbitration agreement on the ground that arbitrations, if unsupervised by the courts, are undesirable, and that legislation was needed to make possible such supervision. But if that was the reason for unfriendliness to

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such executory agreements, then the courts should also have refused to aid arbitrations when they ripened into awards. And what the English courts, especially the equity courts, did in other contexts, shows that, if they had had the will, they could have devised means of protecting parties to arbitrations. Instead, they restrictively interpreted successive statutes intended to give effect to executory arbitrations. No similar hostility was displayed by the Scotch [sic] courts. Lord Campbell explained the English attitude as due to the desire of the judges, at a time when their salaries came largely from fees, to avoid loss of income. Indignation has been voiced at this suggestion; perhaps it is unjustified. Perhaps the true explanation is the hypnotic power of the phrase, 'oust the jurisdiction.' Give a bad dogma a good name and its bite may become as bad as its bark.

Kulukundis Shipping Co., S.A. v. Amtrog Trading Corp., 126 F.2d 978, 983-984 (1942) (footnotes omitted).

Frances Kellor, a senior official of the American Arbitration Association just after the Second World War, also detected broader, social reasons, for the resistance to arbitration in some quarters in the United States:

It is probable that this situation was due somewhat to the attitude of Americans toward discord and dispute. They were complacently accepted phenomena, to be settled by force or by litigation, if need be. America was a rich country, full of adventure and could afford a considerable volume of disputes at a high cost of settlement. As disputes were regarded as an inevitable and healthful process in the development of a new country, the prospect that they might sometime become a menace to society was not of immediate concern. Since in trade and commerce the marginal profit was then sufficient to allow for a very considerable waste, the attribute of economy was not an attraction to arbitration. In industrial relations, parity of power between employers and employees had not reached the point of encouraging arbitration. ... It is also probable that this early American attitude towards disputes also failed to give arbitration any outstanding advocates. Without such leadership, so conspicuous in other advancing fields of endeavor, arbitration could not present an effective challenge to the fast-growing volume of disputes.

FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 6-7 (1948).



## Section 2. The Advent of the Federal Arbitration Act

A sea change in the generally negative attitude of the American bench towards arbitration began to appear in the latter years of the nineteenth century and the first years of the twentieth, when commercial interests, primarily in the northeast sector of the United States and centered in New York,<sup>631</sup> first sensed the utility and value of arbitration as a means of resolving commercial disputes outside of traditional court structures. The first significant statutory inroads against the entrenched judicial enmity towards arbitration were registered in New York City, where there had been a long tradition of commercial arbitration that stretched back even to the period of the Dutch hegemony.<sup>632</sup> This continuing and persistent commercial tradition registered statutory

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<sup>631</sup> Commercial arbitration had early on found a home in the urban centers of the northeastern United States:

Although arbitration had found a foothold in chambers of commerce as early as 1768 in New York, 1794 in New Haven, and 1801 in Philadelphia, the examples thus set had not resulted in its general acceptance by other chambers of commerce; and even when established it was not generally used because little effort was made to educate the public in its use. Of the thousands of trade associations in operation in 1927, only a comparatively small number of them knew about or used arbitration. Financial and commodity exchanges that had found arbitration practical in New York achieved only a limited application in similar exchanges throughout the country.

*Ibid*, at 7. The history of Georgia's early experiments with commercial arbitration in chambers, boards, and exchanges is rehearsed in some detail, *supra*, in this survey's Chapter One, Section 3 ("Statutory Forms of Informal and Nonjudicialized Arbitration in Georgia"), under *Arbitration in Chambers of Commerce*.

<sup>632</sup> See Bruce L. Benson, *An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States*, 11 J. L. ECON. & ORG. 479 (1995), especially at 481-483 (footnotes omitted):

Arbitration actually was in widespread use in the United States almost three centuries before modern arbitration statutes were passed in the 1920s; its history traces back to the early colonial period. Aiken (1974:

successes when the Chamber of Commerce of the City of New York prevailed on the New York legislature in Albany in 1920 to adopt an arbitration statute providing that arbitration agreements and awards would be “valid, enforceable [sic] and irrevocable, save upon such grounds as exist at

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160) explored records from the Dutch period in New York (1624-1664), for instance, and explains: "Arbitration in New Netherlands in the 17th century ... was frequent, swift, and relatively simple compared to the English common law." Jones (1956: 209) examined newspapers, merchant letters, and the records of the New York Chamber of Commerce, as well as legal records, and found that arbitration was in constant and widespread use in New York throughout both the Dutch colonial period and the British colonial period (1664-1783). Indeed, there is substantial evidence demonstrating that merchants established arbitration arrangements in each of the American colonies (Aiken, 1974; Auerbach, 1983; Jones, 1956; Smith, 1961: 180-88; Odiome, 1953, 1954). ... Furthermore, arbitration was also used to settle disputes between businessmen from different colonies; arbitration of disputes between New York and Philadelphia merchants developed in the 17th century, for instance, as trade between those communities developed (Aiken, 1974; Jones, 1956). ...

The most complete record of an arbitration tribunal during the late 18th century is that of the New York Chamber of Commerce. One of the first actions taken by this organization at its first meeting on April 5, 1768, was to make provisions for arbitration, and the Chamber's first arbitration committee was appointed on June 7 of that year (Jones, 1956: 207). There is also evidence of "considerable demand" for arbitration services from the Chamber, as committees were appointed regularly until 1775 when the Chamber temporarily suspended meetings because of the war (Jones, 1956: 207). Four years later, on September 7, 1779, an arbitration committee was again appointed, and arbitration meetings continued throughout the revolutionary period. In fact, during the British occupation of New York, all civil disputes were referred to the Chamber's arbitration committee by the British occupation forces (Jones, 1956: 209).

*See also on early New Amsterdam and New York commercial arbitration, Eben Moglen, Commercial Arbitration in the Eighteenth Century: Searching For The Transformation of American Law, 93 YALE L. J. 135 (1983), especially at 135-147.*

law or in equity for the revocation of any contract.”<sup>633</sup> Kellor describes this statute as a “change in pattern” from that which was customary in the United States:

This law possessed the unusual features of looking forward instead of backward, and of enabling parties in dispute to control future disputes as well as to settle existing disputes. Although similar features had existed in British and Scottish laws for many generations, it proved to be a revolutionary step in the Americas as it had not been in other countries.<sup>634</sup>

The New York statute found a receptive welcome and was soon emulated by similar statutory initiatives in other American states.<sup>635</sup> Drawn by the success of the New York statutory innovation, it was only five years later when the United States Congress turned its attention to

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<sup>633</sup> 1920 N.Y. Laws ch. 275 § 2, *cited* in Anthony S. Fiotto, *The United States Arbitration Act and Preliminary Injunctions: A New Interpretation of an Old Statute*, 66 B.U. L. REV. 1041 (1986), at 1058, fn. 121.

<sup>634</sup> In 1948, Kellor wrote:

Under the provisions of this new law [adopted in New York in 1920], agreements to submit to arbitration future disputes arising out of the contract containing such agreements, were made legally valid, enforceable, and irrevocable save as any other contract is revocable. Hitherto only existing disputes had enjoyed such legal protection. Furthermore, this law closed the courts to parties to arbitration agreements until they had complied with their arbitration agreements and it brought to the aid of the parties the powers of the court in enforcing agreements and awards by authorizing them to appoint arbitrators or otherwise expedite arbitration upon default of one of the parties.

*Ibid*, at 10-11.

<sup>635</sup> Kellor asserts that the New York statute was the inspiration for substantially similar legislation in “Arizona, California, Connecticut, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.” *Ibid*, at 11, fn. 6. It is unclear why she redundantly includes the New York law in this list.

the validation of the commercial arbitral process through the adoption of the Federal Arbitration Act.<sup>636</sup> The nuclear, operative language of that act was drawn almost verbatim from the terms of the earlier New York initiative and provided:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>637</sup>

The new federal legislation thus announced a general policy firmly committed to the enforcement of arbitral arrangements. In addition, the act went forward to make available procedural devices which could be put to the service of the enforcement of such agreements. § 4 of the Act, for instance, was intended to ensure that federal district courts could exercise the

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<sup>636</sup> United States Arbitration Act February 12, 1925, ch. 213 [Federal Arbitration Act of 1925, Federal Arbitration Act, or “FAA”], 43 Stat. 883.

<sup>637</sup> Federal Arbitration Act, § 2. It was not wholly clear until the decision of the U. S. Supreme Court in *Perry v. Thomas*, 482 U.S. 443 (1987), that the final clause of this section was a reference to *state law* and, hence, something of a victory for the viability of state policy in the field of national arbitration law. This important point in the case may have been overlooked because, in its holding, the court sustained the preemption by the Federal Arbitration Act of a California statute preserving the right to trial in the conventional courts on claims arising out of employment contracts, even when these contained an arbitration clause. *See Charles Davant IV, Tripping on the Threshold: Federal Courts’ Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L. J. 521 (2001) (footnotes omitted), at 529: “*Perry* was the first Supreme Court decision to indicate (albeit in dicta) that under the Federal Arbitration Act, federal and state courts should apply ordinary state contract principles to determine whether an agreement to arbitrate is valid, revocable, or enforceable ... .”

procedural prerogative of ordering parties to obey an existing agreement to arbitrate.<sup>638</sup>

Similarly, the federal legislation in its § 3 sought to prevent any recourse to the conventional courts by parties to a prior arbitration agreement by authorizing federal courts to enjoin litigation brought in violation of such an arbitral contract.<sup>639</sup>

Given these statutory features promoting and supporting arbitration, none could reasonably question the broadly favorable policy towards commercial arbitration which informed the 1925 federal legislation. Nonetheless, the novelty of the language and the innovation which it represented in the context of American arbitration law created a number of

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<sup>638</sup> Federal Arbitration Act of 1925, § 4, stipulates:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction ... for an order directing that such arbitration proceed in the manner provided for in such agreement ...

Analogous language exists in § 206 the Federal Arbitration Act providing, in cases where the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards controls, that:

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

<sup>639</sup> Federal Arbitration Act of 1925, § 3, states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the courts in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration ...

residual ambiguities with respect to the Federal Arbitration Act and the scope of its statutory reach, ambiguities which persist even today and which cloud, in many respects, the efficiency, effectiveness, and viability of the Federal Arbitration Act as it has evolved since 1925.<sup>640</sup> The consequence of these uncertainties is perhaps even greater with respect to the stability in the application of state arbitration laws, including those of Georgia.

### Section 3. The Substantive and Preemptive Character of the Federal Arbitration Act of 1925

One of the most fundamental questions surrounding the implementation of the Federal Arbitration Act remains its proper ambit and reach and the corresponding impact of the federal legislation on the power and autonomy of the states of the American union to adopt and enforce laws in the area of arbitration and arbitral policy. It is clear in the explicit terms of the Federal Arbitration Act itself that the provisions of the act reach to the regulation of arbitral agreements “in any maritime transaction or a contract evidencing a transaction involving commerce.”<sup>641</sup> This language is strongly suggestive of federal constitutional authority over admiralty and interstate commerce as a matter of American federalism and the basic allocation of authority between the federal government and the states of the Union in this important sphere<sup>642</sup>; the

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<sup>640</sup> These ambiguities focus largely on the application of the Federal Arbitration Act as substantive law in federal and state courts, and on its application in displacement of state law in state courts. These issues are treated in more detail, *infra*.

<sup>641</sup> Federal Arbitration Act of 1925, § 2.

<sup>642</sup> See *Southland Corporation v. Keating*, 465 U.S. 1, 12-13 (1984), discussed more fully, *infra*.

language is, however, by no means free of inherent ambiguity.<sup>643</sup> While maritime transactions and contracts in interstate commerce are clearly regulated by the act, it is not at all beyond debate whether the provisions of the act were intended by Congress to apply in the courts of the American states as well as the courts of the federal union.<sup>644</sup> There is, in fact, no specific

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<sup>643</sup> On the evolving interpretation of FAA § 2, *see generally* David P. Pierce, *The Federal Arbitration Act: Conflicting Interpretations of Its Scope*, 61 U. CIN. L. REV. 623 (1992) and Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look At the Past, Present and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995).

<sup>644</sup> *See* Isham R. Jones, III, *The Federal Arbitration Act and Section 2's "Involving Commerce" Requirement: The Final Step Towards Complete Federal Preemption [sic] Over State Law and Policy*, 1995 J. DISP. RESOL. 327, 332 (1995) (footnotes omitted):

For years following the enactment of the FAA, the idea that the FAA applied in state courts was not raised. ... It was not until 1967 when the United States Supreme Court decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* ... that state courts began to apply the FAA.

Cited by Jones, *id.*, on this point, *see also* Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 391 (1992) (footnotes omitted):

Although the significance of the FAA at the date of its enactment depended on the scope of its applicability, the Act was ambiguous on that point. Section 2 of the Act made enforceable only those arbitration agreements that related to maritime transactions and contracts involving interstate commerce. The Act did not specify, however, whether it applied to cases in state court as well as federal court. Nor did specify whether it applied to cases in federal court on diversity of citizenship as well as federal question jurisdiction.

These questions, however, do not appear to have been controversial ones in the decades following the FAA's enactment, at least not with respect to the FAA's central provisions making arbitration agreements valid and enforceable. Courts and commentators concluded, almost unanimously, that the Act applied in all federal cases, including those in federal court on diversity jurisdiction.... Few if any commentators, meanwhile, thought that state courts were obligated to apply the Act.

language contained within the Federal Arbitration Act unambiguously resolving this important and fundamental issue.<sup>645</sup> Similarly, the act is unclear and open to differing interpretations as to whether it was intended to apply in the federal courts in the context of actions filed on the basis of diversity of citizenship or whether it was the intention of Congress to create federal question

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The application of the legislation by federal courts in diversity cases was consistent with the traditional notion that, under long-standing principles of conflicts of laws, the forum court always applies its own procedural law. *Cf. Erie Railroad Company v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring). This in turn implies that the act, as a federal procedural matter, would not apply in state court litigation.

<sup>645</sup> Davant writes:

During the first three or four decades of the Arbitration Act's existence, the Supreme Court (and everyone else) understood that it was a procedural statute applicable only in the federal courts. Most people accepted that the Act's sponsors in Congress intended for its scope to be quite narrow, applying only to cases in admiralty and in "interstate commerce," as that term was defined before the New Deal. In short, the Act was considered part of a "truly federal-state system of arbitration law."

Charles Davant IV, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L. J. 521 (2001) (footnotes omitted), at 526.



subject matter jurisdiction in the language employed by the statute.<sup>646</sup> These fundamental questions were to become, decades later, the focal points of judicial debate in subsequent cases.

These basic issues regarding the scope and reach of the Federal Arbitration Act and its preemptive effect on state law are imbedded in its terms but they do not, however, appear to have been the source of substantial concern in the first few years of the act's application.<sup>647</sup> Well into the 1940s and 1950s, federal courts customarily applied the terms of the Federal Arbitration Act<sup>648</sup> to cases coming before them, whether the cases were in the federal judicial system as a

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<sup>646</sup> *Diversity subject matter jurisdiction and federal question subject matter jurisdiction* are the two basic forms of disputes which may constitutionally come before federal courts in the United States and be adjudicated by them. 28 U.S.C. § 1331 (as amended July 25, 1958, Pub L. 85-554, § 1, 72 Stat 415; Oct. 21, 1976, Pub. L. 94-574, § 2, 90 Stat. 2721; December 1, 1980, Pub. L. 96-486, § 2[a], 94 Stat. 2369), essentially permits the federal courts to adjudicate matters where the claim of the plaintiff arises under the constitution, laws, or treaties of the United States. *See generally* *Louisville & Nashville R. R. v. Mottley*, 211 U.S. 149 (1908). Diversity jurisdiction (28 U.S.C. 1332, as amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub L. 88-439, § 1, 78 Stat. 445; October 21, 1976, Pub. L. 94-583, § 3, 90 Stat. 2891; November 19, 1988, Pub L. 100-702, Title II, §§ 201-203, 102 Stat. 4646; October 19, 1996, Pub L. 104-317, Title II, § 205, 110 Stat. 3850), on the other hand, does not require that the claim of the plaintiff arise under federal law at all, but only—in basic terms—that diversity of citizenship exist (in the most usual case, signifying a difference between the state citizenship of the litigants) between or among the parties to the suit. *See, e.g.,* *Mas v. Perry*, 489 F.2d 1396 (1974).

<sup>647</sup> *See* Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 391 (1992), quoted *supra*.

<sup>648</sup> There are, of course, concerns with the preemption of state arbitration policy by federal statutes other than the Federal Arbitration Act, but issues raised by these laws, while relevant, are somewhat aside of the main focus here. On the preemptive effect of, for instance, the federal Labor Management Relations Act with respect to the Georgia Arbitration Code, *see* *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881 (1985), at 884:

The [U. S. Supreme] Court most recently restated the scope of preemption under the NLRA in *Local 926 , International Union of Operating Engineers v. Jones*, 460 U.S. 669, 674-78, 103 S.Ct. 1453, 1458-59, 75 L.Ed.2d 368 (1983), where it noted that if the conduct at issue "is actually

function of diversity subject matter jurisdiction or federal question subject matter jurisdiction.<sup>649</sup>

One can draw from the earlier history of the application of the Federal Arbitration Act that the courts sometime perceived it (albeit most often implicitly) as substantive regulation which would be applicable to all cases in the federal courts, whether filed by the plaintiff as a diversity action or as a federal question subject matter jurisdiction suit.<sup>650</sup>

This issue as to the fundamental nature of the Federal Arbitration Act as procedural or as substantive became more critical with the ruling of the United States Supreme Court in *Erie v. Tompkins*<sup>651</sup> in 1938. The *Erie* decision –perhaps one of the best known cases ever to be handed

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or arguably protected or prohibited by the NLRA ... state law and procedures are ordinarily preempted." The Court added that exceptions are proper only where the issue "is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act." *Id.* at 676, 103 S.Ct. at 1459.

The converse is also true, of course: The Federal Arbitration Act may well have preemptive effect on state statutes other than the local arbitration code. For example, where it was argued that the FAA preempted the Georgia Nonresident Contractor's Act (closing the doors of Georgia courts to non-Georgia contractors who had not registered in the state to do business here), Judge Ernest Tidwell of the Federal District Court for the Northern District of Georgia ruled, in an opinion conceptually rooted in the rationale of *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), discussed *infra*, that "[t]he FAA cannot pre-empt the Georgia forum-closing statute since the Georgia statute does not directly conflict with any provision of the FAA nor does it frustrate the federal policies that underlie the FAA. Cf. *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477 (1956); *DeKalb County, Georgia v. Henry C. Beck Company*, 382 F.2d 992 (5th Cir.1967)." *Winter Construction Company v. Lamas Constructors, Inc.*, 1987 WL 60203 (1987), rev'd in part and affirmed in part, 863 F.2d 889.

<sup>649</sup> See, e.g., *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959).

<sup>650</sup> *Ibid.*

<sup>651</sup> *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

down by the Supreme Court of the United States— reversed the hoary ruling of that court in the 1842 case of *Swift v. Tyson*.<sup>652</sup> In *Swift*, the United States Supreme Court had taken the position that federal courts were entitled to evolve their own substantive principles and rules of law on questions of general application which would fall under the rubric of general common law. This decision —one which was often challenged but never overruled until 1938— essentially vested the federal courts with authority to develop substantive principles of law for application in all cases coming before them, whether the case was filed as a federal question matter or one falling under

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<sup>652</sup> *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). The more refined details of the *Swift v. Tyson* decision fall well outside the limited scope of this review, but it is important to underscore the fundamental holding of the *Swift* opinion that the federal courts of the United States possess an inherent power to develop their own rules of common law on substantive matters including, significantly, matters of contract. This decision was premised upon the court’s construction of § 34 of the Judiciary Act of 1789 (now appearing in codified form as 28 U.S.C. § 1652 [1948 Acts. Based on Title 28, U.S.C. 1940 ed., § 725 (R.S. § 721)], providing that “the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.” The philosophical foundation for the court’s position in *Swift* rested upon assumptions of natural law which premise the existence of an objective body of principle governing human affairs. This being so, reasoned Justice Story in *Swift*,

... it has never been supposed by us, that the section [34 of the original Federal Judiciary Act] did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permit operation, as for example, to the construction of ordinary contracts or other written instruments and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instruments, or what is the just rule furnished by the principles of commercial law to govern the case.

*Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842).

the diversity jurisdiction of the court.<sup>653</sup> In *Erie*, the Supreme Court reversed this longstanding principle and took the position that the *Swift* rule countenancing a general federal common law was a violation of certain fundamental precepts of American constitutional law limiting the federal government to those matters expressly granted to it under the United States Constitution, and leaving all other substantive matters for regulation by the states and their proper constitutional organs.<sup>654</sup> Under the *Erie* approach, then, federal courts remained competent to evolve federal principles of common law only in restricted areas where such authority was clearly theirs under the terms of the federal constitution; in all other areas, substantive law

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<sup>653</sup> On *Swift* and its reversal by *Erie*, see the influential statement by Judge Charles E. Clark, a principal draftsman of the 1938 Federal Rules of Civil Procedure, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417 (1940).

<sup>654</sup>

*Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). Justice Brandeis, who wrote the majority opinion in the *Erie* case, premised his holding on several independent grounds. The major concern of the court seemed to have been the danger of a violation of the principle of equal protection of the laws which the *Swift* ruling had constructed in creating a division between federal common law and the corresponding perception of common law held by the courts of the various states. This schism in common law principles in turn permitted the nefarious practice of forum shopping by affording an astute plaintiff the option of choosing a state or federal court in a diversity case solely on considerations as to which system would provide the most favorable substantive rule in the resolution of the dispute. This ability to “shop around” was denied to the plaintiff who could not bring his suit in diversity and was relegated solely to the disposition of the case in the state courts.

*Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten “general law” vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.

*Erie Railroad Company v. Tompkins*, 304 U.S. 64, 74-75 (1938).

–including the law of contract where the bulk of principles relevant to arbitration would conceptually and analytically be embedded– remained largely the exclusive province of the states of the American union. In a diversity case, then, the federal courts were under a constitutional obligation to apply the applicable state law to the relevant substantive issues. Even at the heyday of the *Erie* philosophy, however, it was never questioned that the federal courts would remain competent to apply federal principles of procedure.<sup>655</sup> Hence, the *Erie* case in reversing *Swift v. Tyson* precipitated an important issue in determining whether the principles of the Federal Arbitration Act were to be properly characterized as substantive or as procedural: if the Federal Arbitration Act and its wide-ranging countenance of arbitral processes were to be regarded as simply procedural in nature, then the Federal Arbitration Act would arguably never apply in state court litigation to displace state regulation and would have binding application in federal litigation only when the litigation was otherwise properly pending before a federal court since, as a procedural measure, that act could not have created a form of federal question subject matter jurisdiction.<sup>656</sup>

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<sup>655</sup> In a separate concurring opinion in *Erie*, Justice Reed noted that “[t]he line between procedural and substantive law is hazy but no one doubts federal power over procedure. ... The Judiciary Article [of the federal constitution], 3, and the ‘necessary and proper’ clause of article 1, s 8 [also of the national constitution], may fully authorize legislation, such as this section of the Judiciary Act.” *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 92 (1938). *See also* Charles E. Clark, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417 (1940), cited *supra*.

<sup>656</sup> It was not an uncommon view in the period that the FAA was, in substantial measure, adopted pursuant to the power of Congress to regulate procedure implied by Article III, Section 2 of the United States Constitution. *See, e.g.*, *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 70 F.2d 297, 298 (1934), *aff’d* 293 U.S. 449 (1935), and *Agostini Bros. Bldg. Corp. v. United States*, 142 F.2d 854 (1944), both of which were cited by the Second Circuit Court of Appeals for this proposition in *Bernhardt v. Polygraphic Company of America, Inc.*, 218 F.2d 948 (1955), at 951, considered more fully, *infra*.

These questions intensified when, eighteen years later, the United States Supreme Court handed down its decision in the case of *Bernhardt v. Polygraphic Co. of America, Inc.*<sup>657</sup> That litigation was rooted in the arbitration clause appearing in a contract of employment which provided that “any differences, claim or matter in dispute arising between [the parties] out of this agreement or connected herewith”<sup>658</sup> would be subject to a mandatory arbitral procedure. The plaintiff Bernhardt had been discharged by his employer Polygraphic and thereafter sued for breach of his employment agreement; the defendant Polygraphic then sought relief under § 3 of the Federal Arbitration Act, seeking to stay the litigation filed by Bernhardt pending arbitration of their dispute in accordance with the clause in their agreement. The federal district court in which the case had been filed first ruled that, in a diversity case and in obedience to the mandate of *Erie v. Tompkins*, the federal court must reach substantially the same result as would a state court deciding the same matter.<sup>659</sup> The district court interpreted prevailing Vermont law to require the denial of the stay of litigation sought by the defendant, thus permitting the litigation to proceed despite the presence of the arbitration clause. On appeal of this decision, the United States Court of Appeals for the Second Circuit reversed the District Court and made the determination that the availability of a stay under § 3 of the Federal Arbitration Act was *not* substantive within the meaning of *Erie*: the net effect of this holding by the appellate court was

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<sup>657</sup> *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198 (1956).

<sup>658</sup> Substantial portions of the contract between the parties, including its arbitration clause, were reprinted by the Second Circuit Court of Appeals in its opinion in the case. *See Bernhardt v. Polygraphic Company of America, Inc.*, 218 F.2d 948 (1955), at 949.

<sup>659</sup> The district court’s rationale is indicated by the Second Circuit at 218 F.2d 948 (1955), at 950.

that § 3 of the Federal Arbitration Act (and, by extension, *all* of the Federal Arbitration Act) was of a procedural nature and therefore applicable in the federal courts even in a diversity case.<sup>660</sup>

On review by the Supreme Court of the United States, no definitive decision on this sticky question on the fundamental nature of the Federal Arbitration Act was forthcoming. The Supreme Court held instead that the Federal Arbitration Act was simply inapplicable to the dispute since the contract between Bernhardt and the Polygraphic Company of America did not involve either a maritime transaction or a transaction in interstate commerce<sup>661</sup>: accordingly, the

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<sup>660</sup> Judge Frank, writing for the Second Circuit, found, *ibid* at 951, that:

1. We think that a stay, pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, is not "substantive" within the meaning of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, and *Guaranty Trust Company of New York v. York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079. We so held, per Judge Learned Hand, in *Murray Oil Products Company v. Mitsui & Company*, 2 Cir., 146 F.2d 381, 383, where we said: "Arbitration is merely a form of trial, to adopted [sic] in the action itself, in place of a trial at common law: it like [sic] a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure, Rule 39 (c), 28 U.S.C.A."

2. Section 3 [as a federal procedural rule] applies [in litigation in a federal district court] whether or not the agreement is of a kind covered by Sec. 2, i.e., for purposes of Sec. 3, the agreement need not involve a maritime transaction or interstate or foreign commerce. The power to enact Sec. 3 derives from Article III, Section 2 of the Constitution. See, e.g., *Shanferoke Coal & Supply Corp. [v.]. Westchester Service Corp.*, 2 Cir., 70 F.2d 297, 298, affirmed 293 U.S. 449, 55 S.Ct. 313, 79 L.Ed. 583; *Agostini Bros. Bldg. Corp. v. United States*, 4 Cir, 142 F.2d 854.

<sup>661</sup> Wrote Justice Douglas for the majority of the court:

Section 2 [of the Federal Arbitration Act] makes "valid, irrevocable, and enforceable" only two types of contracts: those relating to a maritime transaction and those involving commerce. No maritime transaction is involved here. Nor does this contract evidence "a transaction involving commerce" within the meaning of s 2 of the Act. There is no showing that petitioner while performing his duties under the employment contract was working "in" commerce, was producing goods for commerce, or was

act by its own terms would not apply, held the court, thus obviating any necessity to decide the more fundamental issue of whether the Federal Arbitration Act is of a basically substantive or procedural nature.<sup>662</sup>

The Supreme Court in its review of the case –while not required by its analysis of the case to provide any definitive guidance as to whether the *federal law* was substantive or procedural or the source of its authority– nevertheless took the opportunity to express its strong view that the provisions of the *Vermont arbitration law* which were at issue in *Bernhardt* were of a *substantive* character and thus should presumably be applied by a federal court sitting in a diversity case:

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engaging in activity that affected commerce, within the meaning of our decisions.

*Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 200-201 (1956).

<sup>662</sup> “If respondent's contention is correct,” the court noted, “a constitutional question might be presented.”

*Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases. *Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp.*, 293 U.S. 449, 55 S.Ct. 313, 79 L.Ed. 583, applied the Federal Act in a diversity case. But that decision antedated *Erie R. Co. v. Tompkins*; and the Court did not consider the larger question presented here--that is, whether arbitration touched on substantive rights, which *Erie R. Co. v. Tompkins* held were governed by local law, or was a mere form of procedure within the power of the federal courts or Congress to prescribe. Our view, as will be developed, is that § 3, so read, would invade the local law field. We therefore read s 3 narrowly to avoid that issue. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298, 307, 44 S.Ct. 336, 337, 68 L.Ed. 696. We conclude that the stay provided in § 3 reaches only those contracts covered by §§ 1 and 2.

*Bernhardt*, at 202.



If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought.<sup>663</sup>

For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.

The change from a court of law to an arbitration panel may make a radical difference in the ultimate result.<sup>664</sup>

The court then proceeded to recite a litany of ways in which the parties' selection of an arbitral tribunal for the resolution of their disputes under the state arbitration law would determine the outcome of a case and would be, hence, of a substantive character:

Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by ... the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial. ...

“The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.” There would in our judgment be a resultant discrimination if the parties

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<sup>663</sup> Earlier decisional law in the United States Supreme Court had ruled that, in defining whether a given provision of state law was procedural or substantive in character for purposes of *Erie* classification, matters which were *outcome determinative* in the case were generally to be taken as substantive in nature and, hence, in a diversity action, were to be controlled by state law. *See Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

<sup>664</sup> *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 203 (1956).

suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be.<sup>665</sup>

The issue respecting the fundamental nature of the Federal Arbitration Act and, consequently, the scope of its reach (and possible displacement of state law) was not determined in *Bernhardt*; neither would it simply go away. The question was implicated yet again a decade later in the case of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,<sup>666</sup> where the federal Supreme Court once again adverted to persistent questions as to the fundamental nature of the Federal Arbitration Act, deciding that the contract at issue was one within the constitutional prerogative of the Congress to regulate and that it had, in fact, done so in the FAA.

In *Prima Paint*, the plaintiff had purchased a paint business from Flood & Conklin and, in connection with the sale of the business, there had been executed a consulting agreement under which Flood & Conklin committed themselves to advise and assist the purchaser (Prima Paint) for a stipulated period of time and within a certain geographical area.<sup>667</sup> That consulting agreement stated that arbitration would be the method of resolution of “any controversy or claim arising out of or relating to this agreement.”<sup>668</sup> Later, after a dispute arose between the parties, the buyer Prima Paint initiated a suit in a federal district court and, in response, Flood & Conklin responded with an application under § 3 of the Federal Arbitration Act to stay the litigation pending arbitration in accordance with the agreement of the parties in the consulting contract.

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<sup>665</sup> *Ibid.*, at 203-204. (Citations omitted).

<sup>666</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), discussed *supra* in connection with this survey’s consideration of the doctrine of *compétence de la compétence*, in Chapter Two, Section 5, “The Georgia International Transactions Arbitration Code of 1988.”

<sup>667</sup> The facts of the case are detailed in *ibid.*, at 397-398.

<sup>668</sup> *Ibid.*, at 398.

The federal district court thereupon issued the injunction staying the litigation<sup>669</sup>; this order was then affirmed by the Second Circuit Court of Appeals.<sup>670</sup>

On review in the Supreme Court of the United States, the stay of litigation under the authority of the federal act was affirmed.<sup>671</sup> The Supreme Court first held that the contract in question was indisputably governed by the Federal Arbitration Act since, in *Prima Paint* unlike in *Bernhardt*, the contract was clearly one related to a transaction in interstate commerce.<sup>672</sup> The majority opinion in *Prima Paint*, authored by Justice Fortas, met this *in limine issue* head on. In affirming the lower courts, the Supreme Court decided that the federal Congress had adopted the

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<sup>669</sup> 262 F. Supp. 605.

<sup>670</sup> 360 F.2d 315.

<sup>671</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). The reasoning of the Supreme Court differed markedly from that of the Second Circuit, 360 F.2d 315, which essentially addressed the issue in the case within the framework of *Erie*, finding that “national substantive law” as expressed in the FAA controlled the outcome of the case. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), at 399-400.

<sup>672</sup> Justice Fortas, writing for the majority, held that:

In *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956), this Court held that the stay provisions of s 3 [of the Federal Arbitration Act], invoked here by respondent F & C, apply only to the two kinds of contracts specified in ss 1 and 2 of the Act, namely those in admiralty or evidencing transactions in 'commerce.' Our first question, then, is whether the consulting agreement between F & C and *Prima Paint* is such a contract. We agree with the Court of Appeals that it is. *Prima Paint* acquired a New Jersey paint business serving at least 175 wholesale clients in a number of States, and secured F & C's assistance in arranging the transfer of manufacturing and selling operations from New Jersey to Maryland. The consulting agreement was inextricably tied to this interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business. There could not be a clearer case of a contract evidencing a transaction in interstate commerce.

*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967) (footnotes omitted).

Federal Arbitration Act in exercise of its constitutional authority over interstate commerce and admiralty, and not simply in the employment of its power over the regulation of federal courts contained in Article III of the United States Constitution.<sup>673</sup> As framed by the court, “the question [here] is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter such as interstate commerce over which Congress plainly has the power to legislate. The answer to that can only be in the affirmative.”<sup>674</sup>

... [I]t is clear beyond dispute that the [FAA] is based upon and confined to the incontestable federal foundations of “control over interstate commerce and over admiralty.” H.R. Rep. No. 96, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1 (1924); S. Rep. No. 536, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess., 3 (1924). . . . Federal courts are bound to apply rules enacted by Congress with respect to matters – here, a contract involving commerce – over which it has legislative power.<sup>675</sup>

Accordingly, some of the lingering questions regarding the applicability of the Federal Arbitration Act in the context of federal diversity cases were laid to rest by the court’s decision that the FAA was adopted as a matter of *substantive* initiative under the clause of the federal constitution permitting congressional control over matters in interstate commerce; to that extent, nettlesome issues arising under the *Erie* dichotomy of *substance versus procedure* were diminished.<sup>676</sup> At the same time, however, a thoughtful observer might well have sensed in this

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<sup>673</sup> *Ibid.*, at 404-405.

<sup>674</sup> *Ibid.*, at 405.

<sup>675</sup> *Id.*

<sup>676</sup> The certainty and clarity of the Court’s majority opinion in *Prima Paint* should not, however, lull the reader into a false sense of security regarding the stability of the judicial position that the Federal Arbitration Act is of a substantive character. Even in *Prima Paint* itself, strong dissenting views were registered by Justice Black, in which Justices

vindication of federal prerogative that an emerging federal challenge to the viability of independent and autonomous state determination in arbitral policy matters, at least in the vital field of commercial relations, was becoming ominously more pronounced.

Despite the direct implications of the ruling of the Supreme Court in *Prima Paint*, many state courts continued to disregard the Federal Arbitration Act in cases filed in them where the act was, under the rubric of the 1967 decision, arguably applicable: *Prima Paint* was, after all, a diversity action initiated in a federal district court and *not* a suit in a state court. This resistance to the logic of *Prima Paint* –while not universal<sup>677</sup>– persisted until 1984 when the Supreme Court

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Douglas, and Stewart joined, regarding the characterization of the act as substantive (and thus applicable in both federal and state courts) and not procedural (and, hence, binding only on federal courts in a diversity case):

Today, without expressly saying so, the Court does precisely what Judge Medina did in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), a prior federal opinion presaging the court's ruling in *Prima Paint* that the Federal Arbitration Act is of a substantive character]. It is not content to hold that the Act does all it was intended to do: make arbitration agreements enforceable in the federal courts if they are valid and legally existent under state law. The Court holds that the act gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means. Even if Congress intended to create substantive rights by the passage of the Act, I am wholly convinced that it did not intend to create such a sweeping body of federal substantive law completely to take away from the States their power to interpret contracts made by their own citizens in their own territory. ...”

*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 422 (1967) (Black, J., dissenting). For a recent comment on *Prima Paint*, see Andre V. Egle, *Back to Prima Paint Corp. v. Flood & Conklin Manufacturing Co.: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement*, 78 WASH. L. REV. 199 (2003). The debate among the justices of the federal Supreme Court regarding the substantive nature of the Federal Arbitration Act goes on, however, and this survey will return to this central and critical issue, *infra*.

<sup>677</sup> Georgia state courts, at least in *dicta*, came at least as early as 1973 to the position that the Federal Arbitration Act could apply to the displacement of Georgia arbitration law in

made the express determination that the Federal Arbitration Act, as substantive law, was to have application in state courts as well as in federal diversity actions as intimated earlier under *Prima Paint*. In *Southland Corp. v. Keating*,<sup>678</sup> the Supreme Court decreed that state courts were required to apply the nuclear provisions of the Federal Arbitration Act, extending the holding of *Prima Paint* and affirming both that the Act “creates a body of federal substantive law”<sup>679</sup> and that this initiative of the federal Congress was to have the full impact of one premised on the power to regulate interstate commerce.<sup>680</sup> Noting that Congress “normally creates rules that are

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an action filed in a Georgia court. *See West Point-Pepperell, Inc. v. Multi-Line Industries, Inc.*, 231 Ga. 329 (1973), discussed at greater length, *infra*.

<sup>678</sup> *Southland Corporation v. Keating*, 465 U.S. 1 (1984).

<sup>679</sup> Wrote the court:

At least since 1824 Congress' authority under the Commerce Clause has been held plenary. *Gibbons v. Ogden*, 22 U.S. 1, 196, 9 Wheat. 1, 196, 6 L.Ed. 23 (1824). In the words of Chief Justice Marshall, the authority of Congress is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed." *Ibid*. The statements of the Court in *Prima Paint* that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts. As Justice Black observed in his dissent, when Congress exercises its authority to enact substantive federal law under the Commerce Clause, it normally creates rules that are enforceable in state as well as federal courts. *Prima Paint*, 388 U.S., at 420, 87 S.Ct., at 1814 (Black, J., dissenting).

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, --- U.S., at ----, ---- n. 32, 103 S.Ct., at 942 n. 32, we reaffirmed our view that the Arbitration Act "creates a body of federal substantive law" and expressly stated what was implicit in *Prima Paint*, i.e., the substantive law the Act created was applicable in state and federal court.

*Southland Corporation v. Keating*, 465 U.S. 1, 11-12 (1984).

<sup>680</sup> On this point, the court noted:

The Federal Arbitration Act rests on the authority of Congress to enact

enforceable in state as well as federal courts” when it uses its constitutional power to regulate commerce, the court conceded that there were persistent questions respecting the historical circumstances surrounding the adoption of the act:

Although the legislative history [of the 1925 FAA] is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts. ... This broader purpose can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce. ... [The circumstance of the adoption of the act] makes clear that [the federal Congress] contemplated a broad reach of the FAA, unencumbered by state law constraints. ...<sup>681</sup>

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substantive rules under the Commerce Clause. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the Court examined the legislative history of the Act and concluded that the statute "is based upon ... the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" *Id.*, at 405, 87 S.Ct., at 1806 (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)). The contract in *Prima Paint*, as here, contained an arbitration clause. One party in that case alleged that the other had committed fraud in the inducement of the contract, although not of arbitration clause in particular, and sought to have the claim of fraud adjudicated in federal court. The Court held that, notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract "is for the arbitrators and not for the courts," *id.*, at 400, 87 S.Ct., at 1804. The Court relied for this holding on Congress' broad power to fashion substantive rules under the Commerce Clause.

*Southland Corporation v. Keating*, 465 U.S., at 11.

<sup>681</sup> *Southland Corporation v. Keating*, 465 U.S. 1, 13 (1984). (Citations omitted). In *Southland*, Justice O'Connor picked up the torch of dissent bequeathed to her by Justices Black, Douglas, and Stewart in *Prima Paint*:

*Southland v. Keating* remains among the primary authorities for the proposition that the terms of the Federal Arbitration Act must be applied in state court litigation when the litigation centers upon an arbitral contract relating to maritime transactions or transactions in interstate commerce. “*Prima Paint* and *Southland* thus federalized the law of arbitration by establishing the FAA as the generally applicable substantive law of arbitration in the United States. The scope of the FAA’s applicability now depends entirely on the terms of the FAA itself; if the FAA by its terms applies to an agreement to arbitrate, then it preempts *conflicting* state law.”<sup>682</sup>

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The Court’s decision [today] is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements. ...

The FAA ... was enacted in 1925. ... Congress thought it was exercising its power to dictate either procedure or “general federal law” in federal courts. The issue presented here is the result of three subsequent decisions of this Court.

In 1938 this Court decided *Erie Railroad* ... [which] denied the federal government the power to create substantive law solely by virtue of the Article III power to control federal court jurisdiction. Eighteen years later the court decided *Bernhardt v. Polygraphic Co.* ... [which] held that the duty to arbitrate a contract dispute is outcome-determinative –i.e., substantive– and therefore a matter normally governed by state law in federal diversity cases. ...

... In *Prima Paint* ... we addressed [the] concern [that the act was to be applied only in federal court cases arising under federal law], and held that the FAA may constitutionally be applied to proceedings in a federal diversity court. The FAA covers only contracts involving interstate commerce or maritime affairs, and Congress “plainly has the power to legislate” in that area.

*Southland Corporation v. Keating*, 465 U.S. 1, 22-23 (1984) (citations omitted).

<sup>682</sup> Henry C. Strickland, *The Federal Arbitration Act’s Interstate Commerce Requirement: What’s Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 396-397 (1992) (emphasis added).



#### Section 4. Continuing Debate: The Scope of the Federal Arbitration Act and Its Displacement of State Law

However clear the fundamental holding in *Southland Corp. v. Keating*, it is equally certain that great controversy still swirls around the propriety of this decision. Even in *Southland* itself, the Justices of the U.S. Supreme Court were hardly unanimous in their approach to this question. Justice O'Connor and Justice Rehnquist dissented from the decision in *Southland*,<sup>683</sup> taking the position that the legislative history of the Federal Arbitration Act clearly indicated the intent of Congress to exercise its authority only to prescribe a procedural rule for the federal courts. In the view of those two Justices, the decision in *Southland* "utterly fail[ed] to recognize the clear congressional intent underlying the FAA."<sup>684</sup> From their perspective, the intent of Congress in the adoption of the Federal Arbitration Act was only "to require federal, not state, courts to respect arbitration agreements."<sup>685</sup> Justice O'Connor remains of the opinion that "Congress never intended the Federal Arbitration Act to apply in state courts."<sup>686</sup> More recent additions to the Supreme Court – Justice Scalia and Justice Thomas – have also indicated their belief that the *Southland* decision was wrongly decided and that the Federal Arbitration Act has no application in state courts and, consequently, the possibility of only limited preemptive impact on state arbitration law. "*Southland* clearly misconstrued the

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<sup>683</sup> *Southland Corporation v. Keating*, 465 U.S. 1, 21-36 (1984).

<sup>684</sup> *Ibid*, at 22-23.

<sup>685</sup> *Ibid*, at 23.

<sup>686</sup> See Justice O'Connor's concurrence in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, at 283 (1995): "I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass."

Federal Arbitration Act,<sup>687</sup> in the opinion of Justice Scalia, and that same Justice has declared his ongoing willingness to overrule the decision of the court in *Southland*.<sup>688</sup>

In the more recent decision of the United States Supreme Court in *Allied-Bruce Terminex Companies v. Dobson*,<sup>689</sup> Justices Thomas and Scalia dissented forcefully from a majority position sustaining the continued vitality of the *Southland* doctrine, registering their strong and continuing opposition to the central holding of *Southland* that the Federal Arbitration Act is of a substantive character and hence restrictive of state authority over arbitral policy and preemptive of inconsistent state arbitration legislation: “I do not believe that proper application of stare decisis prevents correction of the mistake,” Justice Scalia wrote. “Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of

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<sup>687</sup> *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, at 284 (1995) (Justice Scalia, dissenting).

<sup>688</sup> *Ibid.*, at 285 (Justice Scalia, dissenting).

<sup>689</sup> *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995). The primary holding of this significant case also advanced the general “federalization” of American arbitral law under the Federal Arbitration Act. In *Allied-Bruce*, the fundamental issue before the United States Supreme Court was not whether the FAA was adopted by the Congress in the exercise of its commerce power – this issue had been finally laid to rest in *Southland v. Keating* by the ruling that the FAA constituted substantive law applicable in both state and federal courts – but rather the proper test for application of the act under the commerce clause itself. The Alabama consumer in *Allied-Bruce* insisted that the FAA would extend to a transaction, to the displacement of state law, only if its application was in the contemplation of the parties at the time of contracting; in opposition, the corporate party (a national pest-control company), relying on the arbitration clause in the consumer contract, advocated a less subjective test. The federal supreme court opted for the application of an expansive understanding of the exercise of congressional power through the Federal Arbitration Act, finding that it was the intent of the Congress for the act to apply whenever, in fact, the underlying transaction involved interstate commerce. *Ibid.*, at 278; see also Isham R. Jones, III, *The Federal Arbitration Act and Section 2’s “Involving Commerce” Requirement: The Final Step Towards Complete Federal Preemption* [sic] *Over State Law and Policy*, 1995 J. DISP. RESOL. 327 (1995).

disputes.’<sup>690</sup> Explaining his concurrence in earlier decisions of the Supreme Court which were constructed on the bedrock principles of *Southland*, Scalia noted:

... I have previously joined two judgments of this Court that rested upon the holding of *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed.2d 1 (1984). See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed.2d 488 (1989); *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L. Ed.2d 426 (1987). In neither of those cases, however, did any party ask that *Southland* be overruled, and it was therefore not necessary to consider the question. In the present case, by contrast, one of respondents' central arguments is that *Southland* was wrongly decided. . . .<sup>691</sup>

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<sup>690</sup> *Allied-Bruce Terminex Companies v. Dobson*, 513 U.S. 265, 284-285 (1995) (Scalia, J., dissenting). Nor should anxieties over party reliance on the holding of the 1984 *Southland* decision deter the court from rejecting its reasoning, Scalia noted: “Abandoning it does not impair reliance interests to a degree that justifies this evil. Primary behavior is not affected: No rule of conduct is retroactively changed, but only (perhaps) the forum in which violation is to be determined and remedied. I doubt that many contracts with arbitration clauses would have been forgone, or entered into only for significantly higher remuneration, absent the *Southland* guarantee. Where, moreover, reliance on *Southland* did make a significant difference, rescission of the contract for mistake of law would often be available.” *Ibid*, at 285.

<sup>691</sup> *Allied-Bruce Terminex Companies v. Dobson*, 513 U.S. 265, 284-285 (1995) (Scalia, J., dissenting). (Citations omitted). To dispel any notion that his concurrence in these decisions was an endorsement of *Southland*, Justice Scalia served notice of his readiness to overturn the decision: “I shall not in the future dissent from judgments that rest on *Southland*. I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time, the course of future lawmaking seems unlikely to be affected by its existence, *cf.* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34-35, 109 S. Ct. 2273, 2298-2299, 105 L. Ed.2d 1 (1989) (SCALIA, J., concurring in part and dissenting in part), and the accumulated private reliance will not likely increase beyond the level it has already achieved.” *Ibid*, at 285.

The net effect of this evolution in federal case law in the construction of the Federal Arbitration Act is to diminish the overarching importance of state legislation in the field of arbitration generally, with regard to both national and international applications. Even in an extreme view of the effect of these cases, however, there still remains a continuing importance of state regulations touching on both domestic and international commercial arbitration, and state-based codes for arbitration retain great vitality and importance in the regulation of domestic and international trade and commerce.

Arguably, the perception that cases such as *Southland v. Keating* and their progeny displace state arbitration codes and render them ineffective does not reflect the true state of federal law regarding state initiatives in the field of arbitration generally, or international commercial arbitration more specifically. The federal courts—including the Supreme Court<sup>692</sup>—have repeatedly affirmed their belief that it was the fundamental purpose of the Federal Arbitration Act to enforce private arbitration agreements in accordance with their terms.<sup>693</sup> The

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<sup>692</sup> *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), reviewed more fully, *infra*.

<sup>693</sup> Among the lower federal court decisions so holding are *Mayard-Paul v. The Mega Life & Health Insurance Co.*, 2001 WL 1711519 (S.D.Fla.,2001); *Texaco Exploration and Production Co. v. AmClyde Engineered Products Co., Inc.*, 243 F.3d 906 (5th Cir.(La.) 2001); *Trefny v. Bear Stearns Securities Corp.*, 243 B.R. 300 (S.D.Tex., 1999); *Community Motors Property Associates Ltd. Partnership v. McDevitt Street Bovis, Inc.*, 59 F.3d 166, Unpublished Disposition, 1995 WL 371424 (4th Cir.(Md.) 1995); *Broadcort Capital Corp. v. Dutcher*, 859 F.Supp. 1517 (S.D.N.Y., 1994); *Dean Witter Reynolds Inc. v. Prouse*, 831 F.Supp. 328 (S.D.N.Y., 1993); *Rubashkin v. Philips, Appel and Waldren Inc.*, 722 F.Supp. 1135 (S.D.N.Y., 1989); *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3rd Cir.(Pa.) 1989); and *Nicholson v. CPC Intern. Inc.*, 877 F.2d 221 (3rd Cir.(N.J.) 1989). State courts have so ruled as well. *See Cantor Fitzgerald, L.P. v. Prebon Securities (USA) Inc.*, 731 A.2d 823 (Del.Ch., 1999) and *Simmons Co. v. Deutsche Financial Services Corp.*, 243 Ga.App. 85 (Ga.App., 2000), the latter of which is discussed at greater length, *infra*.

importance afforded by the Supreme Court to the implementation of the party's agreement to enforce arbitral clauses can be seen in cases such as *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*,<sup>694</sup> where the implementation of the party's intention in this respect resulted in the arbitration of certain issues, while other issues were relegated to judicial *fora*, since they were not within the ambit of the party's agreement to arbitrate.<sup>695</sup>

The *Moses H. Cone* rationale was central in the later decision by the Supreme Court of the United States emphasizing party autonomy and the importance of enforcing arbitration agreements in strict accordance with the wishes of the parties, the core policies of *Volt*

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<sup>694</sup> *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1 (1983).

<sup>695</sup> The court recognized the dilemma where some claims of a party are subject to arbitral resolution, others not:

That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement. If the dispute between Mercury and the Hospital *is* arbitrable under the Act, then the Hospital's two disputes will be resolved separately--one in arbitration, and the other (if at all) in state-court litigation. Conversely, if the dispute between Mercury and the Hospital *is not* arbitrable, then both disputes will be resolved in state court. But neither of those two outcomes depends at all on *which court* decides the question of arbitrability. Hence, a decision to allow that issue to be decided in federal rather than state court does not cause piecemeal resolution of the parties' underlying disputes. Although the Hospital will have to litigate the arbitrability issue in federal rather than state court, that dispute is easily severable from the merits of the underlying disputes.

*Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 19-21 (1983) (citations omitted).

*Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University.*<sup>696</sup> In placing added emphasis on these values, the federal high court necessarily boosted the relative importance of state arbitration policy as expressed in legislative enactments and in state court judicial precedents.<sup>697</sup> In *Volt* –arguably one of the most important decisions in the field of arbitration to be handed down by the Supreme Court in the waning years of the twentieth century– the court ruled that the parties to a commercial undertaking may agree to apply *state* arbitration law, even where the arbitration would otherwise be within the scope and application of the Federal Arbitration Act.<sup>698</sup> This would, in the terms of the *Volt* decision, remain true, even where the implementation of state law would result in the delay of an arbitration which would, under the Federal Arbitration Act, be required to proceed:

It does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA’s primary purpose of insuring that

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<sup>696</sup> *Volt Information Services, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989).

<sup>697</sup> Daniel Zeft concludes, in an observation directed toward the impact of *Volt* in shoring up the application of state *international* arbitration codes, but with implications for state law on arbitration generally, that “ ... the *Volt* decision appears to allow the application of state international arbitration act provisions that further the arbitral process, even if the FAA contains no comparable provisions, when there is a standard choice of law clause selecting the law of the state that has enacted an international arbitration statute.” Daniel A. Zeft, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C.J. INT’L. L. & COM. REG. 705, 787 (1997).

<sup>698</sup> “... [W]e conclude that even if §§ 3 and 4 of the FAA [authorizing motions to compel arbitration and orders staying litigation, respectively] are fully applicable in state-court proceedings, they did not prevent application of Cal.Civ.Proc.Code. Ann. § 1281 2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law.” *Volt Information Services, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 477 (1989).

private agreements to arbitrate are enforced according to their terms. Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.<sup>699</sup>

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<sup>699</sup> The distinction made by the court here between the parties' definition of the scope of arbitrability and their designation of the rules whereby the arbitration is to be conducted was brought home forcefully in the later case of *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). There, claimants had entered into a standard-form agreement with the defendant securities brokerage firm which provided, *inter alia*, for the selection of New York law to control the contract and, at the same time, for any arbitration under the agreement to be conducted according to the Rules of the National Association of Securities Dealers (NASD). Under New York law, punitive damages were forbidden in arbitration proceedings (a rule which, the U. S. Supreme Court later noted, *Mastrobuono*, at 60, would have been preempted by the FAA in the absence of the parties' agreement); according to the NASD rules, however, the panel of arbitrators convened to hear a dispute between the parties was empowered to make an award of such damages. The arbitrators ultimately found for the claimants in an amount including \$400,000 punitive damages. Shearson Lehman Hutton moved to vacate the award, and the Seventh Circuit Federal Court of Appeals affirmed an order of the district court granting this motion. The U. S. Supreme Court granted certiorari in the case and ultimately issued its decision reversing the federal trial and appellate courts and reinstating the award as rendered by the panel of arbitrators. Under the rubric of enforcing the parties' intentions in their arbitration contract, the court found that the contractual agreement to abide by the NASD Rules, with its provision permitting the award of punitive damages, represented the true intention of the parties regarding such a recovery. The ambiguity in the contract was, according to ancient rules of contract construction, to be construed against its drafter, the NASD. *Mastrobuono*, at 62-63. Moreover, ruled the court, the contract terms with their choice of law provision invoking New York law and its prohibition against punitive damages in arbitration proceedings, and their seemingly incompatible choice of forum clause selecting the Rules of the NASD, were to be "read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono*, at 63. Accordingly, the court found that the choice of law clause related to substantive rules of contract while the invocation of the NASD Rules would govern all aspects of the arbitral proceeding, including the right of the arbitrators to make an award or punitive damages. *Mastrobuono*, at 64. The underlying principles of *Mastrobuono* were later affirmed by the federal supreme court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), at 944: "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ...

Where, as here, the parties have agreed to abide by *state* rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the act would otherwise permit it to go forward. By permitting the court to “rigorously enforce” such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA.<sup>700</sup>

The clear gravamen of the *Volt* decision is, then, that parties are free to select the application of state law to their arbitration<sup>701</sup> and, where they do so, the intent and

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should apply ordinary state-law principles that govern the formation of contracts.” A qualification to this broad principle is discussed, *supra*, in this survey’s Chapter Two, Section 5, The Georgia International Transactions Arbitration Code of 1988, in connection with the adoption in that code of the doctrines of *compétence de la compétence* and severability of arbitral clauses.

<sup>700</sup> *Volt Information Services, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 479 (1989). (Emphasis added and citations omitted).

<sup>701</sup> Too much should not, of course, be read into the *Volt* decision. While that case clearly stands for the proposition that private, contractual choice of law clauses may designate the application of state arbitration codes to disputes arising out of maritime and interstate commercial transactions, the bedrock provisions of § 2 of the Federal Arbitration Act mandating the enforceability of arbitration agreements in maritime transactions and transactions in interstate commerce will not permit the validation of state laws antithetical to these principles through the convenient device of private choice of law. Such was the essential holding of the federal supreme court in *Doctor’s Associates, Inc. v. Casarotta*, 517 U.S. 681 (1996) where a Montana State statute singled out arbitration clauses for special mandatory “notice” requirements in written contracts. Such a statutory provision, invalid in itself under the FAA, would not somehow accrue a measure of enforceability by the simple expedient of party choice of law:

The Montana Supreme Court misread our *Volt* decision and therefore reached a conclusion in this case at odds with our rulings. *Volt* involved an arbitration agreement that incorporated state procedural rules, one of which, on the facts of that case, called for arbitration to be stayed pending the resolution of a related judicial proceeding. The state rule examined in



purpose of the Federal Arbitration Act remain to give full vent and effect to their contractual agreement, even if this means that the effectuation of particular terms of the Federal Arbitration Act may be deflected.<sup>702</sup>

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*Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself. We held that applying the state rule would not "undermine the goals and policies of the FAA," 489 U.S., at 478, 109 S.Ct., at 1255, because the very purpose of the Act was to "ensur[e] that private agreements to arbitrate are enforced according to their terms," *id.*, at 479, 109 S.Ct., at 1256.

Applying [Montana's special notice statute] here, in contrast, would not enforce the arbitration clause in the contract between DAI and Casarotto; instead, Montana's first- page notice requirement would invalidate the clause. The "goals and policies" of the FAA, this Court's precedent indicates, are antithetical to threshold limitations placed specifically and solely on arbitration provisions. Section 2 "mandate[s] the enforcement of arbitration agreements," *Southland*, 465 U.S., at 10, 104 S.Ct., at 858, "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. ... Montana's law places arbitration agreements in a class apart from "any contract," and singularly limits their validity. The State's prescription is thus inconsonant with, and is therefore preempted by, the federal law.

*Doctor's Associates, Inc. v. Casarotta*, at 688. Of some historical interest is the fact that SB 540, an early 1986 version of the legislation which was to become the modern Georgia Arbitration Code in 1988, contained a provision requiring special notice measures almost identical to those reviewed by the Supreme Court of the United States in *Casarotta*. This provision was never effective in Georgia law, however. See Memorandum, *Bar Sponsorship of Legislative Proposal to Amend Arbitration Statute*, from E. Wycliffe Orr, Sr., Chair of the Committee To Study Practicality of Mediation and Arbitration of the State Bar of Georgia, to the Advisory Committee on Legislation of the State Bar of Georgia, dated October 23, 1986, in the possession of the author.

<sup>702</sup> And just as the Federal Arbitration Act is reticent in overriding the intention of the parties to arbitration agreements, the act is also not without boundaries in displacing state legislation on the subject of arbitration. "The FAA contains no express preemptive provision," the court reminds us, "nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 469. The doctrine of preemption under the Supremacy Clause of the United States Constitution with specific reference to the Federal Arbitration Act and Georgia arbitration legislation is treated more fully, *infra*, in the present Chapter of this survey, Section 1, under *The Federal Arbitration Act and*

From this understanding of *Volt* and its intellectual genealogy, then, we may speculate that state arbitration policy –and implementing state codes– will be of critical importance in at least three broad circumstances touching on the formation of arbitral contracts, the course of the arbitral process, and the enforcement of arbitral awards:

1. *The realization of party autonomy.* If the parties in their choice of law clause in their contract elect the application of state law, the premium placed upon the high value of party autonomy may well require that the Federal Arbitration Act be displaced and that the provisions of state arbitration codes be given precedence, even where these are contradictory to, or at least incompatible with, the spirit or the letter of the Federal Arbitration Act itself. This was, of course, the specific scenario in which the decision of the Supreme Court in *Volt*<sup>703</sup> was grounded.

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*Georgia Arbitration Law: Georgia Courts, Georgia Arbitration Law, and Federal Preemption.*

<sup>703</sup> In a word, the provisions of state law may well represent the active condition upon which the parties have come to their agreement and, in such a case, the fundamental *Grundnorm* of *pacta sunt servanda* dictates that state law apply regardless of its compatibility with federal provisions. Party autonomy too must have its limits, of course; otherwise, the *in terrorem* specter summoned up by Justice Brennan in his dissent in *Volt* (in which he was joined by Justice Marshall) could well have merit: “Were every state court to construe such [choice of law] clauses [indicating a selection of state law] as an expression of the parties’ intent to exclude the application of federal law, as has the California Court of Appeal in this case, the result would be to render the Federal Arbitration Act a virtual nullity as to presently existing contracts. I cannot believe that the parties to contracts intend such consequences to flow from their insertion of a standard choice-of-law clause. Even less can I agree that we are powerless to review decisions of state courts that effectively nullify a vital piece of federal legislation.” *Volt*, 489 U.S. at 491-492 (Brennan, J., dissenting). Justice Brennan’s observations bring into sharp focus legitimate questions as to the reality and reasonableness of an inference to exclude federal law, drawn only from the simple adoption by the parties of a form choice of law clause electing the application of state law. On party autonomy generally, see Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT’L L. 1189 (2003), especially at 1205, where the author articulates the kind of concerns which prompted Justice Brennan’s reservations about party autonomy in arbitration:

2. *Constitutional federalism and the limitation on the scope of federal authority.* By its own terms, the Federal Arbitration Act is applicable only to contracts in interstate commerce or related to a maritime transaction. In the event that the subject matter of a given agreement falls neither within the interstate commerce authority of the Congress to regulate nor within the scope of federal admiralty jurisdiction, presumably state legislative authority would remain intact and the provisions of state codes on arbitration would apply fully.<sup>704</sup>

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Despite its provision of efficiency and functionality, should the deregulation of arbitration be absolute? Must the enacted law on arbitration always have a secondary, default status in all circumstances and in every transaction? Are some limits (perhaps pertaining to the arbitrability of disputes) feasible, warranted, or essential as to various aspects of arbitration's scope of application? What type of restraints should be considered and how extensive should they be? Should they proceed from public-interest considerations, a rights-protection rationale, or only from issues pertaining specifically to the operation of the arbitral process? From whose authority might such limits proceed?" Larry E. Ribstein voices much the same concern about the excesses of party autonomy: "But choice-of-law clauses present normative and positive analytical puzzles. From the normative standpoint of whether courts should enforce these clauses, if we reasonably assume that some mandatory laws are efficient, why should parties be able to evade them by the simple expedient of writing contracts providing for application of alternative law? This reasoning seems to underlie the traditional hostility to these clauses on the ground that government rather than private parties should determine scope of application of its laws.

*See also* Larry E. Ribstein, *From Efficiency To Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 366 (2003) and Faith A. Kaminsky, *Arbitration Law: Choice-of Law Clauses and the Power to Choose Between State and Federal Law*, 1991 ANN. SURV. AM. L. 527 (1992), at 541.

<sup>704</sup> Concededly, the adoption by the Supreme Court of the United States of an expansive objective, factual standard for involvement in interstate commerce in *Allied-Bruce Terminex Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), will reduce (if not outright eliminate) virtually all commercial transactions outside of the regulatory ambit of interstate commerce. Accordingly, few instances of unregulated commercial transactions

3. *Interstices in the regulatory structure of the Federal Arbitration Act.* The FAA clearly reflects the time and circumstances of its origin and there are few responsible authorities in the field of arbitration who would contend that the act is comprehensive or exhaustive of the subjects related to the arbitration or the arbitral process. Accordingly, there is much of an interstitial character which remains open for state legislative regulation in the field of arbitration. While there are many instances of such *lacunae* in the legislative framework of the Federal Arbitration Act, among the more prominent and widely discussed are the possibilities of discovery in the arbitral process and the availability of preliminary relief.<sup>705</sup> In areas such as these where there is no language within the Federal Arbitration Act dispositive of the matter, any

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will exist:

The overall effect of [*Allied-Bruce Terminex*] is to enforce arbitration agreements contained in contracts which in fact affect interstate commerce. Any state law or policy contrary to federal law and policy will be superseded. The only hope for party wishing to avoid an arbitration clause is to show the contract has no effect on commerce. Given the broad definition of commerce, however, proving a contract does not affect interstate commerce in any way is no easy feat.

Isham R. Jones, III, *The Federal Arbitration Act and Section 2's "Involving Commerce" Requirement: The Final Step Towards Complete Federal Preemption [sic] Over State Law and Policy*, 1995 J. DISP. RESOL. 327, 349 (1995).

<sup>705</sup> The possibilities here are myriad. Questions concerning the formal validity of the arbitration agreement are not addressed in the FAA itself, as noted *supra*. Similarly, the composition of the arbitral tribunal; the obligation of arbitrators to make disclosure of conflicts of interest; details regarding the challenge of an arbitrator; the number and appointment of arbitrators; and consolidation of arbitral proceedings are among the matters which are largely unregulated by the federal statute. See Sébastien Besson, *The Utility of State Laws Regulating International Commercial Arbitration and Their Compatibility With The FAA*, 11 AM. REV. INT'L. ARB. 211,225-232 (2000). To be sure, federal common law picks up where the FAA leaves off in many instances, but even here state arbitration codes can have an important role in filling gaps and supplying definitions. See George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C.J. INT'L. & COM. 419, 455 (1992) (footnotes omitted).

state regulation on these subjects would survive a preemption argument unless, arguably, it somehow thwarted, directly or indirectly, the *pro* arbitration bias of the Federal Arbitration Act.<sup>706</sup>

The single most significant point to be made regarding the continued viability and the enduring utility of state statutory initiatives in the field of commercial arbitration –whether domestic or international in scope and application– was that registered by Heather Purcell:

State international statutes include critical procedures pertaining to choice of law, jurisdiction, and the appointment of and grounds for challenging arbitrators that the authors of the FAA never anticipated seventy years ago. *Since the FAA clearly does not fill the entire field of arbitration law*, the existence of these on-point provisions would, under current practices of making federal common law, provide clear guidelines that should make judicial “legislation” in this area unnecessarily presumptive. The federal statute’s broad guidelines invite supplementation from the states, and recent Supreme Court rulings indicate that existing statutory schemes supportive of underlying federal policies can have significant impact on the making of “interstitial” federal common law.<sup>707</sup>

Some lines of Georgia case authority in recent years, however, have failed to make the fine but nonetheless critical distinctions drawn by Purcell and have, in an apparent misperception of the

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<sup>706</sup> Heather A. Purcell argues persuasively that federal preemption concerns are minimal with regard to state international commercial arbitration codes, and that such codes have special utility with regard to the interstices in the Federal Arbitration Act where important matters are simply not referenced or regulated. Heather A. Purcell, *State International Arbitration Statutes: Why They Matter*, 32 TEX. INT’L. L.J. 525, 540-542 (1997) (emphasis added).

<sup>707</sup> *Ibid*, at 542 (emphasis added).

law, come dangerously close to foreclosing entirely any significant role for Georgia state arbitration policy as expressed in statutory codes and thus to bringing to an untimely end any viable impact of state policy in this critical field.

This survey of arbitration policy in Georgia concludes by turning here to this line of case authority.

#### Section 5. The Federal Arbitration Act and Georgia Arbitration Law: Georgia Courts, Georgia Arbitration Law, and Federal Preemption

The extent to which state legislative policy is displaced and preempted by federal legislation under the Supremacy Clause of the United States Constitution<sup>708</sup> is, it hardly need be said, a sophisticated and nuanced inquiry which touches upon the very essence of American federalism.<sup>709</sup> No better statement of the doctrine of federal preemption has been penned than that written in 1983 by Justice White in the decision of the United States Supreme Court in *Pacific Gas & Electric Company v. State Energy Resources & Development Commission*,<sup>710</sup> a

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<sup>708</sup> “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U. S. CONST., ART. VI.

<sup>709</sup> On the doctrine of federal preemption generally, *see* WILLIAM B. LOCKHART, *ET AL.*, CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS (7<sup>th</sup> ed.) 287-293 (1991); DONALD E. LIVELY, *ET AL.*, CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES 389-395 (1996); and DAVID CRUMP, *ET AL.*, CASES AND MATERIALS ON CONSTITUTIONAL LAW 139-148 (3d ed.) (1998).

<sup>710</sup> *Pacific Gas & Electric Company v. State Energy Resources & Development Commission*, 460 U.S. 190 (1983).

case which pitted the federal Atomic Energy Act against state regulations enacted by California.

Finding no federal preemption of the state law in that case, the federal high court noted:

It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Absent explicit preemptive language, Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."<sup>711</sup>

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<sup>711</sup> *Pacific Gas & Electric Company v. State Energy Resources & Development Commission*, 460 U.S. 190, 203-204 (1983), *citing* *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). The court, at 204, continued:

Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

The general principles of federal preemption formulated in cases such as *Pacific Gas & Electric*,<sup>712</sup> *Hines*,<sup>713</sup> and *Rath Packing Company*<sup>714</sup> are, of course, acknowledged within the body of Georgia jurisprudence as well. The Georgia Court of Appeals has only recently taken the opportunity once again to reiterate the basic principle that federal law preempts state law,<sup>715</sup> and Georgia courts accept without murmur the proposition that the federal Congress retains authority under the Supremacy Clause to preempt state law when it so directs.<sup>716</sup> Such a federal override of Georgia law can take the form, the Georgia courts concede, of an express preemption by the federal Congress where the intent of the federal legislature is articulated in the national legislation; it may, alternatively, appear where the entire field of legislative action is occupied by the federal law; or preemption may be implied, as where the federal legislation is inconsistent with and contradictory to the state law.<sup>717</sup>

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<sup>712</sup> 460 U.S. 190, 203-204 (1983).

<sup>713</sup> *Hines v. Davidowitz*, 312 U.S. 52 (1941). The *Hines* decision is perhaps best known for its articulation of the so-called “stand as an obstacle” test for the presence of federal preemption: where state legislation impedes the accomplishment of the legislative objectives of Congress, it is deemed preempted even in the absence of the specific congressional intent to displace the state regulation. *See Hines*, 312 U.S., at 67.

<sup>714</sup> 430 U.S. 519 (1977).

<sup>715</sup> *Cincinnati Ins. Co. v. MacLeod*, 259 Ga. App. 761, 764 (2003). *See also* *Poloney v. Tambrands, Inc.*, 260 Ga. 850 (1991) and *Duren v. Paccar, Inc.*, 249 Ga. App. 758 (2001) (a state law which conflicts with a federal law is without effect once it is shown that Congress has expressed its intent, through federal law or regulation, that the federal law should preempt the state law).

<sup>716</sup> *City of Atlanta v. Watson*, 267 Ga. 185, 192 (1996) (“Congress retains authority under the Supremacy Clause to preempt state law when it so directs. ... When faced with the issue of whether a state court must apply a federal statute over a state statute or rule of law, the primary question is whether Congress intended to exercise this authority to set aside state laws.”). (Footnotes omitted).

<sup>717</sup> *Gentry v. Volkswagen of America, Inc.*, 238 Ga. App. 785, 786-787 (1999). *See also* *Georgia Public Service Com’n v. CSX Transp., Inc.*, 225 Ga. App. 787 (1997):



The general federal reticence to intrude on state prerogatives under the federal constitution demonstrated in decisions such as *Pacific Gas & Electric, Hines*, and *Rath Packing Company*, and the usual inclination of federal courts to respect the governmental and regulatory authority of the states of the American union, has carried over into the broad field of arbitration,<sup>718</sup> and these considerations motivated the observations of Justice Stevens in his concurring and dissenting opinion registered in *Southland Corporation v. Keating* in which he brought to bear the general policies of *Pacific Gas and Electric Company* regarding the limited nature of federal preemption into the field of arbitration: “[t]he exercise of State authority in a field traditionally occupied by State law,” Justice Stevens wrote, “will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress.”<sup>719</sup> He continued:

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"[The] [p]reemption doctrine is rooted in the Supremacy Clause and grows from the premise that when state law conflicts or interferes with federal law, state law must give way." *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir.1996). Congress may express a "clear and manifest" intent for federal law to have preemptive effect in three ways: (1) by expressly defining the extent of preemption; (2) by regulating an area so pervasively that an intent to preempt the entire field may be inferred; and (3) by enacting a law that directly conflicts with state law. *Id.*

*Ibid*, at 788-789.

<sup>718</sup> The readiness of the federal judiciary to yield to the states a substantial arena of permissible activity in the field of arbitration policy is hardly surprising, especially given the history of the development of arbitration policy in colonial North America, the early republican period of American history in general, and on into the early twentieth century: the states were the *only* governmental actors involved in the formulation of arbitration policy during that long period, and it was not until 1925 that a substantial presence in the field for the federal government was staked out by the adoption of the Federal Arbitration Act. *See* the discussion, *supra*, in this survey's Chapter Three, Section 1, *The Advent of the Federal Arbitration Act*.

<sup>719</sup> *Citing Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) and ALEXANDER HAMILTON, *THE FEDERALIST*, No. 32, 300 (Van Doren, ed., 1945), in support of this proposition.

Moreover, even where a federal statute does displace State authority, it "rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. ... Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose."<sup>720</sup>

And, of course, an apex of federal judicial regard for state regulatory and governmental power within the field of arbitration was reached in the federal Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, considered at length, *supra*, where the court found no preemption by the Federal Arbitration Act of California's statutory provisions staying arbitration under certain circumstances in favor of judicial resolution of related claims.<sup>721</sup>

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<sup>720</sup> *Southland Corporation v. Keating*, 465 U.S. 1 (1984), Stevens, J., concurring and dissenting, at 18, *citing* and *quoting* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 470-471 (2d ed.) (1973).

<sup>721</sup> *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), 477-479, *passim* (footnotes and citations omitted, emphasis added):

The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. ... But even when *Congress has not completely displaced state regulation* in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law--that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). The question before us, therefore, is whether application of Cal.Civ.Proc.Code Ann. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in

It was just shy of a half century after the adoption of the Federal Arbitration Act by the national Congress in 1925 before that legislation made its debut appearance in the pages of Georgia's appellate court reports when, in 1973, the Georgia Supreme Court handed down its decision in *West Point-Pepperell v. Multi-Line Industries, Inc.*,<sup>722</sup> the first reported case in the Georgia appellate reports which addressed the fundamental issue of whether, in a given case where both arguably applied, state arbitration law or the national policy in the Federal

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accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA. We conclude that it would not.

In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that *the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."* *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 858, 79 L.Ed.2d 1 (1984). ... But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, see *Mitsubishi*, supra, 473 U.S., at 628, 105 S.Ct., at 3353, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, see *Byrd*, supra, 470 U.S., at 221, 105 S.Ct., at 1242, *we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.*

<sup>722</sup> *West Point-Pepperell v. Multi-Line Industries, Inc.*, 231 Ga. 329 (1973).

Arbitration Act would control. West Point Pepperell, a major west Georgia textile manufacturer but one with a central sales office in New York and production plants and facilities in North Carolina,<sup>723</sup> had sought to compel the arbitration of a dispute which had arisen between it and one of its customers, Multi-Line Industries, Inc., another Georgia corporation which had entered into a sales purchase agreement with West Point-Pepperell through the latter's New York offices. To this end, West Point-Pepperell had filed a suit against Multi-Line in New York to compel arbitration in accordance with their contract agreement; Multi-Line, for its part, resisted the Georgia textile manufacturer's effort to arbitrate on the basis that, under Georgia common law, arbitral agreements were regarded as void against public policy because of their effect of ousting the conventional courts of their jurisdiction.<sup>724</sup> It pressed this position in an action it filed in the Superior Court of Troup County, Georgia, in an attempt to restrain West Point-Pepperell

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<sup>723</sup> The somewhat convoluted facts of the case are reflected at *West Point-Pepperell*, 329-331.

<sup>724</sup> See *Parsons v. Ambos*, 121 Ga. 98 (1904), discussed at greater length, *supra*, in this survey's Chapter Two, Section 1, The Common Law of Arbitration in Georgia, Codified and Uncodified. Georgia's common law rule, as noted earlier, provided that broad, all-issue arbitration agreements were void as against public policy since their effect was to oust the conventional courts of jurisdiction. This blanket prohibition was applied full force only where the agreement required the parties to arbitrate *all questions* which might arise in the execution of a contract, both as to liability and to loss. If, however, the arbitration agreement was restricted to such contract incidentals as price, value, measure, quantity quality, classification and like issues, the arbitration provisions in such contracts were deemed valid and were enforced by Georgia courts. See *Manderson & Associates, Inc. v. Gore*, 193 Ga. App. 723, 731 (1989) (citations and emphases omitted); see also *generally* *Leonard v. House*, 15 Ga. 473 (1854) and *Millican Electric Co. v. Fisher*, 102 Ga. App. 309 (1960). The salient point here, of course, is that Georgia law generally prohibited arbitration agreements while federal law was just as rigorous in enforcing them. As a consequence, anytime any arbitration agreement came within the ambit of the federal legislation, conflict between the Georgia law and the federal statute was automatic; just as automatic was the dominance of the federal legislation under the Supremacy Clause whenever and wherever the federal law reached the matter.

from the prosecution of its arbitration proceeding in New York. In response, West Point-Pepperell obtained an order from the New York state court restraining Multi-Line from pressing its action in Georgia in which, in the meantime, an order had been entered by the Troup County court restraining West Point-Pepperell from pursuing the arbitration proceeding in New York on the basis that, as argued by Multi-Line, the broad arbitration agreement between the two corporations<sup>725</sup> was void under Georgia law as against public policy. This order was then appealed by West Point-Pepperell which insisted that its arbitration agreement with Multi-Line was valid and enforceable under the Federal Arbitration Act, Georgia's anti-arbitration common law rule (if it applied at all) notwithstanding.

When the matter reached the Georgia Supreme Court, the issue –one of first impression in Georgia– was squarely put: did Georgia's deep-seated common law prohibition against arbitration yield under the circumstances of this case to the federal statute and its vehemently pro-arbitration policy? In response, the Georgia court managed to evade a clear and direct ruling on this question but, at the same time, gave an unambiguous indication of its conviction that the Federal Arbitration Act was directly implicated in the matter and would control the outcome of the case.

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<sup>725</sup> The arbitration clause at issue in the case provided that “[a]ny controversy arising out of or relating to this contract, including any modification or amendment thereof, shall be settled by arbitration in the City of New York in accordance with the Rules then obtaining of the American Arbitration Association or the General Arbitration Council of the Textile Industry, whichever shall be first selected by the party instituting set arbitration.” *West Point-Pepperell*, 231 Ga. 329, at 332. The order of the trial court restraining West Point-Pepperell from its attempts to compel arbitration under this clause left no room that, in that court's opinion, the provision was one of those broad form arbitration clauses “so far contrary to the public policy of the state as an attempt to oust the courts of this state from jurisdiction as to render said attempt avoid.” *Ibid*, at 330.

The court rebuffed the argument of Multi-Line, the party resisting the enforcement of the arbitration contract, that Georgia's common law of arbitration would not enforce the arbitration contract between it and West Point Pepperell: under Georgia's long-standing rule still prevalent in 1973, general, broad arbitration clauses mandating the arbitral resolution of *all* issues in a dispute were concededly invalid; nonetheless, the court pointed out, this general proposition had always been subject to a major qualification permitting the arbitration of any incidental and limited issues in dispute between contract parties, including such matters as "price, value, measure, quantity, quality, classification, and similar questions."<sup>726</sup> As the Georgia court understood the case, the arbitration sought by West Point Pepperell related solely to such "incidentals" in its contractual relationship with Multi-Line and, accordingly, was enforceable by a motion to compel under Georgia law.<sup>727</sup>

The decision of the Georgia Supreme Court, however, went a step further and took note of its view that the same result would ensue from the application of the Federal Arbitration Act.

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<sup>726</sup> *West Point-Pepperell*, at 331, *citing and quoting* *Wright v. Cecil A. Mason Construction Company*, 115 Ga. App. 729 (1967) and *Southern Mutual Insurance Company v. Turnley*, 100 Ga. 296 (1897).

<sup>727</sup> One of the more curious aspects of the Georgia Supreme Court's decision in this case is its conclusion that the arbitration clause between the two parties concerned was one addressing only "incidentals" as that term had been employed in prior Georgia case law to describe the permissible ambit of arbitration in the state. "The controversy between the parties to this case," the Georgia court wrote, seemingly tongue-in-cheek, "involved only the failure to pay the purchase price and the claim by the appellee of a breach of the implied warranty of the merchantability of the goods," *West Point-Pepperell*, at 331-332, the court's clear implication being that these fundamental matters were mere "incidentals," the arbitration of which was permitted under Georgia law. In point of fact, the scope of the arbitration clause in *West Point-Pepperell* seems to be functionally identical to that which had been criticized by the Georgia Court of Appeals in *Wright v. Cecil A. Mason Construction Company*, 115 Ga. App. at 730-731, as an attempt to oust the Georgia courts of their jurisdiction. The *West Point-Pepperell* court ignored any impulse to explain its apparently contradictory reasoning in this respect.

Stressing the multi-state and interstate elements present in the relationship between West Point-Pepperell and Multi-Line Industries, Georgia's high court was clear as to the consequence:

Where such a transaction involves commerce, within the meaning of the Federal Arbitration Statute, the state law and policy with respect thereto must yield to the paramount federal law.<sup>728</sup> . . . [Georgia cases establishing the state's anti-arbitration rule are] not applicable to the facts in the present case where the transaction involves interstate commerce. The United States Arbitration Act was intended to avoid the common law rule that an agreement between parties to a contract to settle any dispute between them by arbitration was void and against public policy as and [sic] effort to oust the courts of their jurisdiction.<sup>729</sup>

The court provided no definition of its use of the term "paramount" in the rule handed down in *West Point-Pepperell*, especially as to the critical question as to whether the federal law would be *paramount* for the simple reason that it was federal in character or, alternatively, whether it would enjoy *paramount* status only in the event of conflict with state provisions. In

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<sup>728</sup> In reaching this conclusion, the court relied on the decision of the Sixth Circuit Federal Court of Appeals in *American Airlines, Inc. v. Louisville & Jefferson County Airport*, 269 F.2d 811 (1959), which in turn rested on the rationale of *Bernhardt v. Polygraphic Company*, 350 US 198 (1956), considered at more length, *supra*, in this survey's Chapter Three, Section 1, *The Substantive and Preemptive Character of the Federal Arbitration Act of 1925*.

<sup>729</sup> *Citing Standard Magnesium Corp. v. Fuchs*, 251 F.2d 255 (1957), a decision of the Federal Circuit Court of Appeals for the Tenth Circuit enforcing an arbitral award rendered in Norway. It does not stand directly for the proposition for which it was cited by the Georgia Supreme Court in *West Point-Pepperell* but rather for the concededly related concept that "Congress intended by § 2 of the [Federal Arbitration] Act to abrogate the common-law rule that agreements to arbitrate are revocable by either party at any time before an award has been made and to place arbitration agreements on the same footing as other contracts." *Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455 (1957), at 457.

the factual and legal circumstances of *West Point-Pepperell*, it would be entirely possible to conflate the two disparate possibilities for the simple reason that, at the time of this decision, Georgia law generally denied validity and enforceability to arbitral agreements across the board. Accordingly, in the context of the case then at bar, the simple fact of a transaction being within the jurisdictional ambit of the Federal Arbitration Act meant, in essence, that the federal law would in every case be applied to override the virtually universal anti-arbitration position of Georgia. In a word, *application* of the Federal Arbitration Act meant, *ipso facto* and without any further analysis, *conflict* with Georgia policy and, hence, the constitutional supremacy of the federal rule. Thus, the substantive result reached by the Georgia Supreme Court in *West Point Pepperell v. Multi-Line Industries* is, in most aspects, unassailable in its logic and yet, as future decisions of Georgia's appellate courts handed down in the next several decades were to demonstrate, the intellectual construct of the decision contained within itself a serpent's egg, a subtlety subject to easy misperception and distortion which was to cloud future opinions of Georgia's appellate courts for years to come and which indeed, to some degree, still befuddles and renders ambiguous the position of Georgia law regarding its preemption by the Federal Arbitration Act.

Within three years of its decision in *West Point Pepperell*, the Georgia Supreme Court, in an opinion by Justice Hill, returned to the issue of the scope and application of the Federal Arbitration Act and its potential preemption of Georgia state law in *CCC Builders, Inc. v. City Council of Augusta*.<sup>730</sup> There, a contracting firm had petitioned for a writ of mandamus to compel performance of an arbitration clause in connection with a wastewater treatment plant

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<sup>730</sup> *CCC Builders, Inc. v. City Council of Augusta*, 237 Ga. 589 (1976).



construction contract it had earlier concluded with the City of Augusta. Following much the pattern as had been presaged in the *West Point Pepperell* decision, Justice Hill concluded that the Federal Arbitration Act would have application because the transaction was one involving interstate commerce;<sup>731</sup> he nevertheless premised the decision of the court sustaining the mandamus on the basis that the contract in question was not, contrary to the assertion of the City Council of Augusta, a broad form arbitration provision such as would be void under Georgia law, but rather one permissibly limited in scope to issues such as the amount of loss or damage and, as such, enforceable.<sup>732</sup> Cited in support of the court's conclusion that, where "such a transaction involves [interstate] commerce, within the meaning of the Federal Arbitration Statute, the State law and policy with respect thereto must yield to the paramount federal law,"<sup>733</sup> were both the decision in *West Point-Pepperell* itself and the Sixth Circuit opinion in *American Airlines, Inc. v. Louisville Air Board* which had been relied upon in *West Point-Pepperell* to sustain the rationale of that earlier decision. The inherent ambiguity surrounding the court's use

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<sup>731</sup> "Under the Federal Arbitration Statute (9 U.S.C. s 1 et seq.) a broad arbitration provision (invalid under State law) in a contract involving interstate commerce is valid, irrevocable, and enforceable," *citing* 9 U.S.C. § 2 and *West Point Pepperell, Inc. v. Multi-Line Industries, Inc.*, 231 Ga. 329, 201 S.E.2d 452 (1973).

<sup>732</sup> *CCC Builders, Inc. v. City Council of Augusta*, 237 Ga. 589, 591 (1976). A similar device was invoked to avoid a direct ruling on the degree of preemption by the Federal Arbitration Act in *Savannah Transit Authority v. Ledford*, 179 Ga. App. 238 (1986). In *Savannah Transit*, however, Judge Carley took the view that the appellate record was not sufficient to determine whether or not the arbitration agreement between the parties was of an impermissibly broad form or acceptably limited and, for this reason, could not determine whether the FAA acted to preempt the arbitration agreement if in fact it were determined to be an *all issues* contract. Presumably, this matter was to be resolved after remand to the trial court; no further record of the case, however, appears in the Georgia appellate court reports.

<sup>733</sup> *Ibid*, at 592.

of the term “paramount federal law” was, just as that phrase had been in *West Point-Pepperell*, left unexplained and unexplored.

By the time this issue returned to appellate court consideration a year later in *Paine, Webber, Jackson & Curtis, Inc. v. W. W. McNeal*<sup>734</sup>—the first instance in which the question of federal preemption through the FAA of Georgia’s arbitration law had appeared in the Georgia Court of Appeals—subtle shifts in the phraseology of the *West Point-Pepperell* rule were beginning to signal the emerging perception by Georgia’s courts that the sheer fact of the Federal Arbitration Act’s application to a given transaction meant, *ipso facto*, the automatic, unflinching application of the federal law of arbitration without any further consideration of the potential application of state law. In the *McNeal* case, a dispute between a former customer of the securities broker-dealer filed a common law tort action in the State Court of Fulton County, alleging at the same time violations of the federal Securities Act of 1933. The brokerage firm responded, quite predictably, with its motion to stay the litigation and to compel arbitration in accordance with the arbitration clause in the contract between the parties.<sup>735</sup> In doing so, they

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<sup>734</sup> *Paine, Webber, Jackson & Curtis, Inc. v. W. W. McNeal*, 143 Ga. App. 579 (1977).

<sup>735</sup> In addition, the the plaintiff asserted that the securities broker employed by Paine, Webber (and also a named defendant in the action) was not subject to the arbitration agreement contained in the contract between Paine, Webber and McNeal, and could not avoid common law trial in reliance on the arbitration agreement, because he had not signed the instrument. The trial court was to sustain this position, holding that, under Georgia law, a nonsignatory to a contract could not be compelled to arbitrate under a provision of that agreement. *Paine, Webber, Jackson & Curtis, Inc. v. W. W. McNeal*, 143 Ga. App. 579 (1977). The Court of Appeals reversed this holding, ruling “that the ends of justice are more nearly met by holding that [the employee] must be allowed to participate in the arbitration . . .” *Ibid*, at 582. The underlying policy of the *McNeal* decision to extend, in some circumstances, the right to participate in arbitration to a nonsignatory of the underlying arbitration clause—a policy premised on the Georgia court’s perception of the applicable rule under the Federal Arbitration Act and that legislation’s decidedly pro-arbitration bias—has been extended by cases purportedly

explicitly relied on the decision in *West Point-Pepperell* and its rule that, where the underlying transaction is one within commerce as defined in the Federal Arbitration Act, “the federal law is paramount.”<sup>736</sup> “That holding,” the court, in its opinion by Judge Shulman, noted, “is now law in

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applying the FAA but decided after the adoption of the 1988 Georgia Arbitration Code. In *Comvest, L.L.C. v. Corporate Securities Group, Inc.*, 234 Ga. App. 277 (1999), the Georgia Court of Appeals determined that the corporate customer of a securities brokerage firm which did not sign the instrument containing the arbitration clause involved in the case was nonetheless bound by the terms of that provision because of its imputed knowledge of industry practice regarding arbitration and because of its acceptance of benefits under the contract with apparent knowledge of the arbitration clause, *Comvest*, at 280; at the same time, the court found on similar reasoning that a nonsignatory corporate alter ego of the signatory brokerage firm would be permitted to enforce the clause, even though it too had not signed the original arbitration agreement. *See Comvest*, at 281, *citing* *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993). This expansive application of the duty or obligation to arbitrate on the part of nonsignatories to arbitral agreements was confirmed in late 2003 by the Court of Appeals in *AutoNation Financial Services Corporation v. Arain*, 264 Ga. App. 755 (2003), where a lender was permitted to assert an obligation to arbitrate contained in a sales contract which it had not signed. Reasoning that the interlocking rights, duties and obligations bound up in a sales contract and its underlying finance agreement represented but a single factual transaction and that considerations touching upon the potential for conflicting decisions by an arbitral panel and a conventional court; the status of the parties as alleged joint tortfeasors; the relationship of the claims to the arbitration contract; and the existence of an agency relationship, all weighed in favor of permitting the lender to assert the arbitration clause in the sales contract. *See AutoNation*, 592 S.E.2d 96, at 98-100, *citing* *McNeal, Comvest*, and, perhaps with most emphasis, *MS Dealer Svc. Corp. v. Franklin*, 177 F.3d 942 (11<sup>th</sup> Cir. 1999). Most recently, in March of 2004, the Georgia Court of Appeals, in a case where the customer of a pest control company sought to avoid liability for extermination services, determined once again that a nonsignatory might, under appropriate circumstances, be bound by an obligation to arbitrate. *See Lankford v. Orkin Exterminating Company, Inc.*, 2004 WL 445130. *Citing* its decision in *Comvest*, the court ruled that “the law is plain that by accepting benefits and making payments under the contract, [the defendant customers] ratified it even if the signature [appearing on the original contract] was irregular.” *See Lankford*, at 2, *citing* *Comvest*, at 280-281. Moreover, the court ruled, the customers –when they brought a suit for breach of contract against the pest control company in a conventional court– ratified and confirmed that agreement and, with it, its arbitration clause. *Id.* In reaching its decision in this case, the court leaned heavily on its prior ruling in *AutoNation Financial Svcs. v. Arain*. *See Lankford*, at 3.

<sup>736</sup> *Ibid.*, at 580.

this state.” And, formulating in substance what was to become a virtual mantra in Georgia courts in future years, he continued, “*West Point-Pepperell* is controlling here if this arbitration agreement comes within the Federal Arbitration Act.”<sup>737</sup> Although the language used by Judge Shulman in the opinion in *McNeal* is conditioned upon the application of *paramount* federal law—again, an ambiguous term open to a construction which would permit only the preemption of *conflicting*<sup>738</sup> state rules—*McNeal*’s affirmation of the rule invoked in *CCC Builders* and in *West Point-Pepperell* further solidified the growing impression within the pages of Georgia appellate opinions that the mere application of the FAA to a transaction automatically and without further analysis inferred the sole and exclusive use of federal law without any in-depth consideration of the underlying compatibility of the corresponding or analogous state rule.<sup>739</sup>

The Court of Appeals’ decision in *McNeal* in October, 1977, was the last decision rendered by any Georgia appellate court on the question of FAA preemption of Georgia arbitration law prior to the adoption by the Georgia legislature in 1978 of the Georgia Construction Arbitration Code,<sup>740</sup> the statutory initiative which, among other innovations in

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<sup>737</sup> *Id.*

<sup>738</sup> The presence of conflict in this case was easy to find, and the conflict was an even easier one to resolve: “whether the Georgia policy against arbitration must yield to the Federal Arbitration Act,” as the issue was framed by the court, was a rhetorical question at best. *Id.*

<sup>739</sup> See, for instance, the decision of the Georgia Court of Appeals in *Shearson/American Express, Inc. v. Henson*, 169 Ga. App. 950 (1984), where yet another conflict involving securities transactions on a national exchange presented itself for appellate court resolution. The court, dutifully bowing to *West Point-Pepperell* and *McNeal*, found an attempted revocation of his arbitration agreement by the disgruntled client to be controlled adversely by the Federal Arbitration Act. See *Henson*, at 950-951.

<sup>740</sup> The Georgia Construction Arbitration Code of 1978 is considered in detail in this survey’s Chapter Two, Section 3, The Georgia Construction Arbitration Code of 1978, *supra*. Perhaps the most important conceptual point in the new code was its reversal of

Georgia arbitration law, was the first expressly to reverse Georgia's long-standing rule of arbitration agreement invalidity to any significant extent. Whatever may have been the expectations that the 1978 law might trigger a reassessment by the courts of Georgia of their open hostility to the enforcement of general arbitration agreements, these were to be short-lived.

As a consequence of the 1977 decision in *McNeal*, one facet of which indicated that the claimant's allegations of violations of the 1933 Securities Act were not within the authority of the state court to adjudicate, any more than they were within the power of an arbitral tribunal to settle,<sup>741</sup> the federal securities law violations alleged by the plaintiff were subsequently litigated before the federal district court in Atlanta pursuant to the rule prevalent at that time which barred the arbitration of such claims.<sup>742</sup> The case returned to the Georgia Court of Appeals in 1982, this time presenting the basic question as to whether the decision in the federal district court finding no securities law violation on the part of Paine, Webber constituted *res judicata* with respect to

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the strong Georgia policy against *all issues* arbitration, at least in the limited sphere of construction contracts. The litigants involved in the *McNeal* case made an additional appearance in the Georgia Court of Appeals five years later. *See Paine, Webber, Jackson & Curtis, Inc. v. W. W. McNeal*, 161 Ga. App. 835 (1982). In an opinion written by Judge Carley, the Court of Appeals noted, *inter alia*, that the arbitration contract between the brokerage firm and its customer would, under Georgia law, encompass the claims of the customer against the employee of the brokerage firm.

<sup>741</sup> *See Wilko v. Swan*, 346 U.S. 427 (1953), as to the federal rule, prevailing at the time of *McNeal*, prohibiting the arbitration of claims under the Securities Act of 1933. The central holding of *Wilko* that claims under the Securities Act were not subject to arbitral resolution was reversed by the Supreme Court of United States in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), perhaps among the most significant decisions touching on arbitrability handed down by the federal high court in the late twentieth century. *See*, among the numerous publications on this case, Mark A. Cleaves, *An Irresistible Force Meets An Immovable Object: Reforming Current Standards As To The Arbitration of Statutory Claims*, 8 J. L. & COM. 245 (1988).

<sup>742</sup> *See* the discussion of these events in *Paine, Webber v. McNeal*, 161 Ga. App. 835 (1982), at 835-836.

McNeal's common law tort claims for fraud and misrepresentation then pending in the State Court of Fulton County.<sup>743</sup> The Georgia Court of Appeals in an opinion by Judge Carley determined that it had been within the pendent subject matter jurisdiction of the federal district court to adjudicate McNeal's common law claims along with his Securities Act violation allegations.<sup>744</sup> Accordingly, since he could have brought these claims before the federal court but did not, he was then barred by the doctrine of *res judicata* from asserting these in the state court action.<sup>745</sup>

Almost simultaneously with its second decision in *McNeal*, the Georgia Court of Appeals, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wilbanks*,<sup>746</sup> an opinion written by Judge Banke, melded the rules in *West Point-Pepperell* and the 1972 *McNeal* decision, holding that, "although Georgia's policy does not favor 'all issues' arbitration clauses, that policy must yield where it conflicts with federal policy as set forth in the Federal Arbitration Act,"<sup>747</sup> citing *West Point Pepperell* and the first *McNeal* opinion as support for this proposition. The earlier *McNeal* decision was also relied upon as support for the proposition that "transactions involving the purchase and sale of securities on national exchanges involve commerce within the meaning of the Federal Arbitration Act and that arbitration agreements relating to such transactions are *consequently* enforceable . . ."<sup>748</sup> In candor, objective analysis indicates that the phraseology of

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<sup>743</sup> Paine,Webber v. McNeal, 161 Ga. App. 835 (1982).

<sup>744</sup> *Ibid*, at 837-838.

<sup>745</sup> *Ibid*, at 838.

<sup>746</sup> Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wilbanks, 162 Ga. App. 154 (1982).

<sup>747</sup> *Id*.

<sup>748</sup> *Ibid*, at 155. (Emphasis added). As unquestionably correct as is the ruling of the court here, the automatic equation of enforceability of the Federal Arbitration Act with the bare

the rule relied upon by the *Wilbanks* court, purportedly drawn from *West Point Pepperell*, is substantially more faithful to the law than the rendition of that rule in the original source itself: by stressing that state law “yields” to federal policy only where it “conflicts” with the Federal Arbitration Act, Judge Banke came measurably closer to the mark than did either the Court of Appeals opinion in *McNeal I* or the earlier Georgia Supreme Court decision in *West Point-Pepperell*.<sup>749</sup>

In *Hilton Construction Co., Inc. v. Martin Mechanical Contractors, Inc.*,<sup>750</sup> Judge Quillian, writing for the Georgia Court of Appeals in 1983, found that, in a case subject to the reach of and held to be controlled by the Federal Arbitration Act, a state court had no authority under § 10 of the legislation addressing the authority of a court to vacate arbitral awards because, in his view, that section (facially pertaining to the power of a “United States court in and for the

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fact of coverage by the FAA is one fraught with dangerous implications for the viability of state policy in the field.

<sup>749</sup> Not even a month after his decision in *Wilbanks*, Judge Banke, dissenting in *Tasco Ind., Inc. v. Fibers & Fabrics of Georgia*, 162 Ga. App. 593 (1982), took issue with the dismissal of an appeal to the Georgia Court of Appeals where the appellant sought a review of a trial court’s decision denying a motion to stay litigation in order to afford the parties to the litigation an opportunity to arbitrate in accordance with their underlying agreement. The majority of the court, in an opinion by Chief Judge Quillian, took the position that the purported direct appeal filed in the case was inappropriate, and that an interlocutory appeal should have been sought by the disappointed party, therefore dismissing the misbegotten appeal. Judge Banke took this action as a denial of the appellant’s right to arbitrate the dispute in accordance with the Federal Arbitration Act, which he clearly regarded as applicable in the case. In the absence of the right to make a direct appeal, Judge Banke insisted, the disappointed party “may lose his rights under the arbitration agreement altogether if, upon denial of the motion, he is not afforded the right of direct appeal.” *Tasco Ind., Inc. v. Fibers & Fabrics of Georgia*, 162 Ga. App. 593 (1982) at 594.

<sup>750</sup> *Hilton Construction Co., Inc. v. Martin Mechanical Contractors, Inc.*, 166 Ga. App. 40 (1983).

district wherein the award was made”<sup>751</sup> to vacate an award) was restricted in its use to federal courts only.<sup>752</sup> On motion for rehearing in the case, the appellant insisted that the Federal Arbitration Act was to be applied by state courts in its entirety, a position which would permit state courts to vacate awards under § 10 of the FAA just as could federal district courts. “The Georgia cases do not so hold,”<sup>753</sup> the Court of Appeals ruled and, in rebuffing the suggestion to the contrary by the appellant, added unintentional support to a hyperbolic interpretation of *West Point Pepperell*. “The court [in *West Point Pepperell*] held,” the Court of Appeals wrote in an unsigned order denying the motion for a rehearing of the case, “that the Georgia policy, expressed in such cases as *Parsons v. Ambros*, 121 Ga. 98 (1) 48 S.E.696 which held that arbitration agreements operating to oust courts of jurisdiction are void, must yield to national policy where the transaction involves interstate commerce.”<sup>754</sup>

The distinction between Judge Carley’s *post hoc* rendition of the *West Point Pepperell* rule and the rule as it appeared in the original case was, admittedly, a subtle one, but one which nonetheless served to reinforce a growing misperception in Georgia courts that a finding of an application of the Federal Arbitration Act meant automatic displacement of any corresponding

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<sup>751</sup> Federal Arbitration Act, § 10. This provision of the Federal Arbitration Act is discussed at some length, *supra*, in connection with this survey’s consideration of the grounds for vacatur of an arbitral award under Georgia and federal law found in Chapter Two, Section 6, The 2003 Amendment to the 1988 Georgia Arbitration Code: Manifest Disregard of Law.

<sup>752</sup> *Hilton Construction Co., Inc. v. Martin Mechanical Contractors, Inc.*, 166 Ga. App. 40 (1983), at 42.

<sup>753</sup> *Ibid*, at 44.

<sup>754</sup> *Id.* *West Point Pepperell*, it must be admitted, made no such ruling: it restricted its holding to instances where state arbitration law would yield to *paramount* federal law, and did not endorse reflexive, immediate state subservience to some amorphous concept of “national policy” in the field of arbitration law.



provision of state arbitration law, whether that law was contradictory to, or consistent with, the federal statutory requirement. The misplaced emphasis drawn from *West Point Pepperell* was compounded by the court's unqualified and unconditioned reference to the rule in *McNeal* which, in its view, "recognized that federal law is paramount,"<sup>755</sup> without suggesting any necessity for further analysis to determine actual conflict or incompatibility between the state and federal legislation.

The Court of Appeals premised its decision in *Hilton Construction Company* on immeasurably more accurate grounds where it found, in its order denying any rehearing in the case, that Georgia's "method of and . . . basis for attacking an arbitration award"<sup>756</sup> was not preempted by any provision of the Federal Arbitration Act and that, in fact, Georgia law provided a recourse against invalid awards, a recourse not displaced by the Federal Arbitration Act. "Thus," because of the presence of an analogous method of vacating awards in Georgia law, "one is not deprived of a valuable right nor is the paramount federal policy favoring arbitration in any way diminished by a Georgia court applying its own state law vis a vis grounds for setting aside an award rather than the grounds that the federal district courts are required to utilize [under § 10 of the FAA]."<sup>757</sup> "In summary," the court continued,

the Federal Arbitration Act expresses a policy that arbitration agreements arising out of a transaction involving interstate commerce are to be enforceable by all courts of this land. However, the all inclusive aspects of the Act are directed only

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<sup>755</sup> *Hilton Construction Co., Inc. v. Martin Mechanical Contractors, Inc.*, 166 Ga. App. 40 (1983), at 45.

<sup>756</sup> *Ibid*, at 46.

<sup>757</sup> *Id.*

to the federal courts who must apply this law in its entirety regardless of former federal decisions in this area and regardless of the law of the situs state of such federal court. . . . Under the circumstances here, we find no plainly manifest congressional intent to impose the same statutory grounds— explicitly detailed as a basis for a federal district court to set aside an arbitration award— on a state court which is passing upon such matters.<sup>758</sup>

Accordingly, the subtle inaccuracy of the court’s earlier observation that “Georgia policy” must yield to “national policy” where the transaction involves interstate commerce was more than offset by the court’s carefully crafted and perceptive observation that preemption is ultimately a question of congressional intent, a matter which must be inquired into on a case by case basis and is not subject to blanket, knee jerk automatic rules.

The decision of the Court of Appeals in *Hilton Construction Company* was affirmed in late 1983, but the Georgia Supreme Court in doing so disputed the decision of the Court of Appeals that state courts could not apply the vacatur standards in § 10 of the FAA. Stressing that the Federal Arbitration Act had been interpreted in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*<sup>759</sup> to create a body of federal substantive law, the Supreme Court took issue with the Court of Appeals over the question of whether or not the state courts could (or should) apply the provisions of § 10 of the FAA. Finding that such power was within the prerogatives of the state judiciary, Georgia’s high court found nonetheless that the absence of facts in the dispute to invoke any statutory ground for such a vacatur of the arbitral award

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<sup>758</sup> *Ibid*, at 46-47.

<sup>759</sup> 460 U.S. 1 (1983).

mooted the question of the court's jurisdiction to apply FAA § 10 and, "since there [was] no question that none of the Section 10 grounds for vacation of the award was present, the [trial] court's refusal to vacate the award and the court's confirmation of the award should be confirmed."<sup>760</sup>

Although the case is not entirely free from all uncertainty, it appears that a major conceptual step towards the complete "federalization" of the field of arbitral policy in Georgia was accomplished in late 1983 when Georgia's Supreme Court handed down its opinion in *DiMambro-Northend Associates v. Blanck-Alvarez, Inc.*,<sup>761</sup> a dispute which had arisen out of the construction of a water management facility in Atlanta.<sup>762</sup> In one of the first decisions of the

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<sup>760</sup> *Hilton Construction Company v. Martin Mechanical Contractors, Inc.*, 251 Ga. 701 (1983), at 704.

<sup>761</sup> 251 Ga. 704. The case was decided on November 30, 1983, and a motion for a rehearing of the matter denied on December 15 of that same year. Earlier, in January 1983, the Georgia Supreme Court had decided the case of *Phillips Construction Co. v. Cowart Iron Works, Inc.*, 250 Ga. 488 (1983), in which it had acknowledged the legislative adoption of the Arbitration Code for Construction Contracts, along with its provision that courts may compel arbitration, O.C.G.A. § 9-9-86 (a), "thereby demonstrating the General Assembly's approval of arbitration of construction contracts," and thus taking this class of arbitration agreements out of Georgia's traditional prohibition against the enforcement of broad arbitration agreements. The *Phillips Construction* decision did not, however, entail any significant application or interpretation of the new Construction Arbitration Code, and the opinion in the case was not cited later in 1983 when the Georgia Supreme Court came to its ruling in *DiMambro-Northend Associates*. The *Phillips Construction* opinion also made reference to the appellate decision in *Pace Const. Corp. v. Houdaille Industries, Inc.*, 155 Ga. App. 923 (1980), as well as to the related decisions in that litigation made in 245 Ga. 696 (1980) and 247 Ga. 367 (1981), but a fair reading of those opinions does not clearly indicate that these decisions were rendered under the (at that time new) Georgia Arbitration Code for Construction Contracts.

<sup>762</sup> Given the sweeping (and displacing) mandate afforded by the Georgia Supreme Court to the Federal Arbitration Act in *DiMambro Northend Associates*, it is not surprising that the court did not take up the issue of whether the construction of a water management facility construction project would fall within the ambit of Georgia's Arbitration Code for Construction Contracts of 1978. That code provided, in O.C.G.A § 9-9-81(b), that it

court respecting the arbitration of disputes arising out of construction agreements since the Georgia legislature had adopted the “Georgia Arbitration Code for Construction Contracts” in 1978, the court decided the issue between the parties in exclusive reliance on § 3 of the Federal Arbitration Act making provision for a stay of litigation pending arbitration. In justification of its *sub silentio* slight of the analogous provision found in Georgia’s 1978 legislation, the court emphasized its perception of the impact of the recent decision by the United States Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*,<sup>763</sup> and its teaching, as understood by the Georgia court, “that the statutory policy of rapid and unobstructed enforcement of arbitration agreements is binding on state as well as federal courts.”<sup>764</sup> In presumed obedience to the rule in *Moses H. Cone Memorial Hospital*, Georgia’s high court completed the doctrinal leap which had been inferred, hinted at, and suggested by Georgia state

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applied “only to construction contracts, contracts of warranty on construction, and contracts involving the architectural or engineering design of any building or the design of alterations or additions thereto.” However, the same court which decided *DiMambro Northend Associates* in December of 1983 ruled in February of 1984 in *Camp v. Columbus*, 252 Ga. 120 (1984), that the construction of a sanitary landfill in the City of Columbus, Georgia, fell within the statutory definition of a construction contract provided in O.C.G.A § 9-9-81(b). Accordingly, it stretches credulity to believe that the Georgia Supreme Court in *DiMambro* ignored the possibility of applying Georgia’s own Construction Arbitration Code, vice the FAA, on the basis that the project involved did not fall within the statutory definition of a construction contract. The source of this slight, it would appear, lies elsewhere. It should be noted, however, that Chief Justice Hill, who joined in the *DiMambro* opinion, dissented in *Camp* on the basis that the Georgia Construction Arbitration Code did not encompass within its terms the project involved in that case: “[a]lthough the phrase ‘construction contracts’ is not defined [in the Construction Arbitration Code], it is clear to me that the General Assembly intended the [construction] arbitration code to apply to the building and erection of structures, not the burying of waste.” *Camp*, at 122 (Hill, C. J., dissenting).

<sup>763</sup> 460 U.S. 1 (1983), discussed, *supra*, in the survey’s Chapter Three, Section 1, *The Substantive and Preemptive Character of the Federal Arbitration Act of 1925*.

<sup>764</sup> *Dimambro Northend Associates*, at 706.

judicial constructions following the *West Point-Pepperell* decision in 1973: without so much as a suggestion of analysis or construction of Georgia's law to determine its compatibility with or contradiction of the analogous federal standard, the *DiMambro-Northend* court ruled broadly: "we accept and adopt this construction regarding the scope and purpose of the Arbitration Act [stated in *Moses H. Cone Memorial Hospital*] and find that the arbitration clause at issue in the present case clearly falls within the ambit of the act."<sup>765</sup> The broad nature of this pronouncement is all the more stunning in light of the fact that, in the same paragraph in which it announces the general, sweeping (but unanalytical) rule of federal predominance in arbitration policy, it quotes the moderating and temperate language of the U. S. Supreme Court, also an integral part of the holding the federal high court in *Moses H. Cone*, clearly reserving to the states substantial area of play in the formulation of arbitration law, procedure, and policy: "... the [Federal Arbitration] act," said the federal tribunal, "embodies 'a Congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'"<sup>766</sup> This recognition by the U. S. Supreme Court of the expansive leeway given states to develop arbitration policy consistent and compatible with the federal legislation seems not to have registered with the Georgia Supreme Court in its opinion in *DiNambro-Northend Associates*.

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<sup>765</sup> *Dimambro-Northend Associates*, at 707, citing *Hilton Construction Co. v. Martin Mechanical Contractors, Inc.*, 251 Ga. 701 (1983), presumably for the proposition that an arbitration agreement in a transaction in interstate commerce is within the ambit of the Federal Arbitration Act and "[w]here such a transaction involves commerce within the meaning of the Federal Arbitration Statute, the state law and policy with respect thereto must yield to the paramount federal law." *Ibid*, at 703, quoting *West Point-Pepperell, Inc. v. Multiline [sic] Industries, Inc.*, 231 Ga. 329 (1973).

<sup>766</sup> *Dimambro-Northend Associates*, at 706-707, quoting *Moses H. Cone*, 103 S. Ct. 927, 941-942 (1983).

In mitigation –if not in defense– of the decision by the Supreme Court of Georgia in *DiMambro-Northend Associates*, following in the conceptual wake of its decade-earlier opinion in *West Point-Pepperell* to equate unanalytically and reflexively FAA jurisdiction with unquestioning FAA application, it must be said that the nuanced and sophisticated approach to issues of federal preemption demonstrated in cases such as *Cincinnati Insurance Company v. McLeod*,<sup>767</sup> *Poloney v. Tambrands, Inc.*,<sup>768</sup> *Duren v. Paccar, Inc.*,<sup>769</sup> *City of Atlanta v. Watson*,<sup>770</sup> *Gentry v. Volkswagen of America, Inc.*,<sup>771</sup> and *Georgia Public Service Commission v. CSX Transportation, Inc.*<sup>772</sup> (each of which is considered more fully, *supra*) were years off in the future and Georgia appellate courts arguably had not, as of the time of the *DiMambro-Northend Associates* decision, fully developed the fine art of coordination of state and federal policies inherent in a fully matured approach to questions of federal preemption of state legislation. Nonetheless, *DiMambro* had opened the floodgates and, as a consequence, decision after decision in both the Georgia Supreme Court and in the Georgia Court of Appeals in the following years dutifully followed in the doctrinal tracks of *DiMambro*, intoning like a monotonous litany the incantation, however imperfect it may have been –most often without a semblance of significant analysis to determine the presence of either conflict between or

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<sup>767</sup> 259 Ga. App. 761 (2003).

<sup>768</sup> 260 Ga. 850 (1991).

<sup>769</sup> 249 Ga. App. 758 (2001).

<sup>770</sup> 267 Ga. 185 (1996).

<sup>771</sup> 238 Ga. App. 785 (1999).

<sup>772</sup> 225 Ga. App. 787 (1997).

compatibility of the state and federal laws— *if there is federal jurisdiction then there must be federal control.*

The appearances over the years of the *Dimambro-West Point-Pepperell* equation of FAA jurisdiction with FAA displacement of state law have been discouragingly frequent in the Georgia appellate reports, especially those of the Georgia Court of Appeals. Among the most cited of such cases is the 1985 decision of that court in *ADC Construction Co. v. McDaniel Grading, Inc.*,<sup>773</sup> where a construction contract between two Georgia corporations, slated to be performed in Georgia, was determined to entail interstate commerce: that fact prompted the court to rule, almost as a matter of self-evident causal relationship, that “[w]e have determined that interstate commerce is involved and that the Federal Arbitration Act ... controls the issues involved.”<sup>774</sup> Significantly, *ADC Construction Company* was decided after the adoption of the 1978 Georgia Construction Arbitration Code, but this fact did not prompt the Court of Appeals to inquire as to whether any provision of that code survived wholesale preemption by the FAA under the rule the court applied in that case. A short form for the ejection of state law under the emerging rubric of the Court of Appeals later made its appearance in *McCormick-Morgan, Inc. v. Whitehead Electric Company*:<sup>775</sup> in this construction case where the 1978 Construction Arbitration Code might well have determined the issues, the Court of Appeals contented itself by holding simply that where “interstate commerce is involved ... the Federal Arbitration Act

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<sup>773</sup> *ADC Construction Co. v. McDaniel Grading, Inc.*, 177 Ga. App. 223 (1985).

<sup>774</sup> *Ibid.*, at 226.

<sup>775</sup> *McCormick-Morgan, Inc. v. Whitehead Electric Company*, 179 Ga. App. 10 (1986).

applies.<sup>776</sup> Two years later, in *Tampa Motel Management Co. v. Stratton of Florida, Inc.*,<sup>777</sup> the Court of Appeals explicitly pushed aside the venue provisions of the Georgia Construction Arbitration Code, explaining that, as held previously in *ADC Construction Company*, “state law and policy must yield to the federal statute if interstate commerce is involved.”<sup>778</sup> The Court of Appeals in *Robinson-Humphrey Co., Inc. v. Williams*<sup>779</sup> determined that the implementation of a trust agreement did not, in and of itself, entail “a transaction involving commerce”<sup>780</sup> so as to require arbitration under the Federal Arbitration Act, but that a related customer agreement did constitute interstate commerce “within the meaning of the Federal Alteration Act,”<sup>781</sup> with the consequence that arbitration would be compelled, presumably subject to the provisions of that federal act, and that act only.

Perhaps the most extreme statement by the Georgia Court of Appeals of the perceived causal relation between FAA jurisdiction and FAA displacement of state law came in November of 1989, barely three weeks before the *Robinson-Humphrey Co., Inc. v. Williams* decision, in *Brockett Pointe Shopping Center, Ltd. v. Development Contractors, Inc.*<sup>782</sup>: “... [a party] presented undisputed evidence showing that out-of-state goods, services, materials and financing were supplied during execution of the construction contract [at issue in the case]. This evidence

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<sup>776</sup> *Ibid*, at 12.

<sup>777</sup> *Tampa Motel Management Co. v. Stratton of Florida, Inc.* 186 Ga. App. 135 (1988).

<sup>778</sup> *Ibid*, at 138.

<sup>779</sup> *Robinson-Humphrey Co., Inc. v. Williams*, 193 Ga. App. 892 (1989).

<sup>780</sup> *Ibid*, at 893.

<sup>781</sup> *Ibid*, at 894.

<sup>782</sup> *Brockett Pointe Shopping Center, Ltd. v. Development Contractors, Inc.*, 193 Ga. App. 854 (1989).



shows that the transaction involved,” the court concluded, “interstate commerce as contemplated by [the FAA]. It therefore follows that the parties’ arbitration agreement is controlled by the Federal Arbitration Act, not the Georgia Arbitration Code,”<sup>783</sup> citing in support of this dubious assertion *ADC Construction Company, McCormick-Morgan, and Hilton Construction Company*. The same emphasis on the automatic causal relationship between interstate commerce, the application of the FAA, and the displacement of Georgia arbitration statutory law appeared yet again in *Hilliard v. J. C. Bradford & Company*,<sup>784</sup> where, in an opinion by Judge Eldridge, the Court of Appeals ruled that “*since* the transaction [in that case] involved commerce within the meaning of the Federal Arbitration Statute, the state law and policy with respect thereto must yield to the preemption of the paramount federal law.”<sup>785</sup> A similar (but in some respects, perhaps, a better) result was achieved, but with inverse reasoning, in *Rhodes v. Inland-Rome, Inc.*,<sup>786</sup> where, since the evidence did not demonstrate that a timber purchase contract had involved interstate commerce, the Federal Arbitration Act was held –for that reason alone– inapplicable.<sup>787</sup> Even in a case where the parties made an express choice of the FAA to control their arbitration agreement, the Court of Appeals felt constrained to cite its cases establishing the

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<sup>783</sup> *Ibid*, at 856.

<sup>784</sup> *Hilliard v. J. C. Bradford & Company*, 229 Ga. App. 336 (1997).

<sup>785</sup> *Ibid*, at 337. (Emphasis added).

<sup>786</sup> *Rhodes v. Inland-Rome, Inc.*, 195 Ga. App. 39 (1990). A similar conclusion, and for similar reasons, was reached by the Court of Appeals in *Columbus Anesthesia Group, P.C. v. Kutzner*, 218 Ga. App. 51 (1995).

<sup>787</sup> The later decision of the United States Supreme Court in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), adopts an exceedingly broad definition of the term “commerce” as it is employed in the Federal Arbitration Act and would seem to impeach the rationale on which the earlier decisions of the Georgia Court of Appeals in *Rhodes v. Inland-Rome, Inc.*, and *Kutzner* were based.

seemingly inexorable linkage between interstate commerce, the application of the FAA, and the displacement of “state law and policy [by the] federal law.”<sup>788</sup> An almost identical result, in almost indistinguishable terms, was announced two years later by the Court of Appeals in *Greenway Capital Corporation v. Schneider*.<sup>789</sup> It seems clear that no consideration was given to the application of Georgia law in *Comvest, L.L.C. v. Corporate Securities Group, Inc.*,<sup>790</sup> where Judge Beasley, somewhat uncritically, noted that “[s]ince the contract relates to transactions in interstate commerce, we decide the case pursuant to the FAA.”<sup>791</sup> The Court of Appeals tacitly approved a trial court’s invocation of the “jurisdiction equals FAA application equals state law displacement” rationale in *Galindo v. Lanier Worldwide, Inc.*,<sup>792</sup> employing language which underscored the court’s endorsement of the causal relationship of the formula’s factors: “[t]he trial court found that the transaction at issue involved interstate commerce and that *therefore* the arbitration was governed by the Federal Arbitration Act.”<sup>793</sup> And, in one of the most recent Georgia appellate cases to address the application of the FAA in circumstances where there might very well have been an accommodation with the analogous provisions of the Georgia

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<sup>788</sup> *Primerica Financial Services, Inc. v. Wise*, 217 Ga. App. 36 (1995).

<sup>789</sup> *Greenway Capital Corporation v. Schneider*, 229 Ga. App. 485 (1997).

<sup>790</sup> *Comvest, L.L.C. v. Corporate Securities Group, Inc.* 234 Ga. App. 277 (1998), at 279. *See also* *Eure v. Cantrell Properties, Inc.*, 236 Ga. App. 427 (1999), employing essentially the same logic as *Comvest* to achieve a substantially identical result. The *Eure* decision, finding that Georgia procedural law permitting the interlocutory appeal of orders compelling arbitration was preempted by the contrary § 16 of the Federal Arbitration Act which prohibited such interlocutory appeals, was soon overturned by the decision of the Georgia Court of Appeals in *Simmons Company v. Deutsche Financial Services Corporation*, 243 Ga. App. 85 (2000), discussed *infra*.

<sup>791</sup> *Ibid*, at 289. (Emphasis added).

<sup>792</sup> *Galindo v. Lanier Worldwide, Inc.*, 241 Ga. App. 78 (1999).

<sup>793</sup> *Ibid*, at 80. (Emphasis added).

Arbitration Code, Judge Eldridge of the Court of Appeals, after a discussion of the interstate character of the construction industry, concluded in *Wise v. Tidal Construction Company, Inc.*,<sup>794</sup> that “when the FAA is applicable, it must be applied using federal substantive law and,” without any apparent consideration of the possibility for the application of consistent and compatible provisions of the Georgia Arbitration Code, “the FAA preempts state law.”<sup>795</sup>

Although it would be a clear overstatement to say that the Georgia courts have now backed away from their views regarding the general displacement, at least in the field of interstate commerce, of Georgia’s arbitration statutes by the Federal Arbitration Act and the consequent restriction of the permissible arena for Georgia policy in the field of arbitration law,<sup>796</sup> unmistakable cracks have more recently appeared in the solid phalanx of appellate decisions in the state suggesting the total preemption of the field by federal law. These opinions—and they have come predominately from the Georgia Court of Appeals which, under the allocation of subject matter jurisdiction among Georgia’s appellate courts made in the Georgia

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<sup>794</sup> *Wise v. Tidal Construction Company, Inc.*, 261 Ga. App. 670 (2003).

<sup>795</sup> *Ibid*, at 676. The suggestion of Judge Eldridge in *Wise* that the Federal Arbitration Act has “preempted the field” of arbitration [“Georgia appellate courts have followed federal cases when the FAA has preempted the field, because the federal act created a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the FAA,” *Wise*, at 673], inferring that there is no latitude for state legislative initiative in this area, is at best somewhat on the hyperbolic side and is difficult, if not impossible, to square with the assurance in *Volt* to the contrary: “The FAA contains no express preemptive provision,” the U.S. Supreme Court wrote in *Volt*, “nor does it reflect a congressional intent to occupy the entire field of arbitration.” *Volt*, 489 U.S. at 469.

<sup>796</sup> As late as March of 2004, the Georgia Court of Appeals continued to cite *Hilton Construction Company* and *Tampa Motel Management Company*, as well as the more recent *Galindo v. Lanier*, for the general proposition that the arbitration of a dispute arising in interstate commerce would invoke, to the apparent exclusion of any consideration of state law, the application of the Federal Arbitration Act and associated common-law principles. See *Joyner v. Raymond James Financial Services, Inc.*, 2004 WL 603912 (Ga. Ct. of Appeals).

constitution and relevant statutes, is the tribunal which most often receives these questions<sup>797</sup>— demonstrate a fresh sensitivity to the appropriate role of state law in the field of arbitration and a pronounced willingness to achieve an accommodation between the coordinate levels of government, state and federal, in this area.

Winds of potential change first appeared in the Court of Appeals 1996 ruling in *North Augusta Associates Limited Partnership v. 1815 Exchange, Inc.*<sup>798</sup> There, North Augusta Associates had entered into a real property development contract with the predecessor of 1815 Exchange, Inc., for the construction of a project in North Augusta, South Carolina. The parties' contract contained an intricate dispute resolution clause which called for the binding arbitration of any insoluble disagreements between them and, after a dispute arose, this provision was

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<sup>797</sup> The Georgia Court of Appeals was first authorized by constitutional amendment in 1905 and began its work as Georgia's second appellate court in early 1906. The tribunal was intended to siphon off much of the workload from the Georgia Supreme Court which had functioned, since it began its work in 1846, as the single appellate court in the state for the review of error in both law and equity cases. On the origin of the Georgia Supreme Court, see Justice Joseph R. Lamar, *A Unique and Unfamiliar Chapter in Our American History*, 10 ABA J. 513 (1924) and John B. Harris, *The Supreme Court of Georgia: An Account of its Delayed Birth*, in A HISTORY OF THE SUPREME COURT OF GEORGIA, A CENTENNIAL VOLUME (1948). On the establishment of the Georgia Court of Appeals, see Robert H. Jordan, *A History of the Court of Appeals of Georgia*, 24 GA. B. J. 371 (1962). Under modern constitutional and statutory provisions distributing the appellate workload between Georgia's two appellate courts, the Supreme Court has exclusive jurisdiction over a limited number of matters including constitutional issues, matters in equity, criminal cases in which capital punishment has been adjudged, and the like. See GA. CONST. ART. 6, SECTION 6, PAR. 3 on the general appellate jurisdiction of the Georgia Supreme Court and GA. CONST., ART. 6, SECTION 6, PAR. 2, on the exclusive jurisdiction of that court. The powers of the Georgia Supreme Court are enumerated in O.C.G.A. § 15-2-8. The jurisdiction of the Court of Appeals is determined by GA. CONST., ART. 6, SECTION 5, PAR. 3. The Court of Appeals has appellate review of all other matters which would include, of particular import here, most contract cases including those involving arbitration clauses.

<sup>798</sup> *North Augusta Associates Limited Partnership v. 1815 Exchange, Inc.*, 220 Ga. App. 790 (1996).

invoked by 1815 Exchange; in response, North Augusta filed an action in Cobb Superior Court to stay the arbitration, insisting that 1815 Exchange had failed to comply with certain conditions precedent stipulated in their contract to be necessary before the invocation of binding arbitration. The Superior Court, after a hearing, denied the motion for a stay of arbitration on the basis that the Federal Arbitration Act applied to this transaction in interstate commerce<sup>799</sup> and did not, under the circumstances of the case, permit judicial action to delay the arbitral proceeding. The trial court had, in apparent reliance on the continued vitality of older cases such as *ADC Construction*, ruled that the provisions of the Georgia Arbitration Act would be displaced in favor of the those in the FAA, and ruled that, under applicable federal law, issues touching upon arbitrability of a dispute (including questions surrounding compliance with conditions precedent to arbitration such as those in the agreement between the parties in the case at bar) were for resolution by the arbitrators, not for the court.<sup>800</sup>

In his review of the matter, Judge Smith, writing for the Georgia Court of Appeals, disputed the lower court's decision that the FAA, because of nothing more than the fact of the parties' contract being one in interstate commerce, controlled every aspect of the case, substantive and procedural. "We do not overlook our earlier holding in *ADC Constr. Co. v. McDaniel Grading*,"<sup>801</sup> the court wrote in preface to the heart of its decision, "that the FAA

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<sup>799</sup> Neither of the parties to the action contested the finding that their contract was one in "commerce" as that term is defined in the Federal Arbitration Act. *See North Augusta Associates Limited Partnership v. 1815 Exchange, Inc.*, 220 Ga. App. 790 (1996), at 792, fn. 1.

<sup>800</sup> *Ibid*, at 791.

<sup>801</sup> *Citing* 177 Ga. App. 223, 226 (3) (1985).

controls an agreement involving interstate commerce. ... That holding has been modified, however, by *Volt Information Sciences v. Bd. of Trustees* ...<sup>802</sup>:

In *Volt Information Sciences*, the agreement contained a choice of law provision reciting that the contract would "be governed by the law of the place where the Project is located." ... The same choice of law provision appears in this case. ... The Supreme Court [of the United States in *Volt*] deferred to the sanctity of individual contracts consistent with the goals of the FAA and held that California arbitration law was not preempted by the FAA: "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." ... *The entire field of state arbitration law therefore is no longer preempted by federal arbitration law in all cases involving commerce.*<sup>803</sup> *State law may apply where parties agree to be bound by state arbitration law, so long as that law does not conflict with the FAA.*<sup>804</sup> Although the application of

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<sup>802</sup> *North Augusta Associates Limited Partnership v. 1815 Exchange, Inc.*, 220 Ga. App. 790 (1996), at 791.

<sup>803</sup> Interestingly, the *North Augusta Associates* court passed over in silence the many decisions of the Georgia Court of Appeals handed down after *Volt* but before the 1996 decision which did *not* recognize, as the court put it, that "[t]he entire field of state arbitration law ... is no longer preempted by federal arbitration law in all cases involving commerce."

<sup>804</sup> *North Augusta Associates Limited Partnership v. 1815 Exchange, Inc.*, 220 Ga. App. 790, 791-792 (1996). (Citations deleted and emphasis added). Even an active choice of state law did not always suffice to secure its application to an arbitration agreement, however, even after the decision in *Volt*. It was a transitory, but nonetheless interesting, configuration which arose in *Booth v. Hume Publishing, Inc.*, 902 F.2d 925 (1990). There, the parties had executed a contract with a choice of law clause (the contract was

Georgia arbitration law in the context of interstate commerce was, in the terms of

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declared to be "subject to and [to be] construed in accordance with the laws of the State of Georgia") arguably a good deal stronger than that which had been determined by the U. S. Supreme Court in *Volt* to have invoked the application of California state arbitration law. Nonetheless, the federal district court in *Hume* declined to apply *Volt*, finding that –again, on language more definitive than that in *Volt*– it could not reasonably have been the parties’ intention for Georgia arbitration law to apply to their transaction and its arbitral clause. The facts of the case – decided after *Volt* came down but on facts which developed before the 1988 Georgia Arbitration Code– were not such, ruled the court, to indicate that the parties’ intent was to have the Georgia *common law* control their transaction:

It is true that the Supreme Court's recent decision in *Volt* creates new law that was not available to Hume when it argued its case in the court below. However, construing the arbitration agreement in accordance with the law of Georgia at the time the contract was negotiated, we are not convinced that the parties to this contract intended that Georgia's common law of arbitration would apply to disputes arising between them. . . . The arbitration provision at issue in this case is an "all issues" arbitration provision of the type disfavored by the Georgia common law of arbitration. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith v. Wilbanks*, 162 Ga. App. 154, 290 S.E.2d 122 (1982). Such a clause would be enforceable under the Federal Arbitration Act but not under Georgia common law. *Id.* ... At the time [the parties] executed their employment agreement, the Georgia courts took the position that the Federal Arbitration Act preempted the state's substantive arbitration law, at least where state law would render the arbitration agreement void. See, e.g., *West Point-Pepperell v. Multi-line [sic] Indus.*, 231 Ga. 329, 330-31, 201 S.E.2d 452, 453-54 (1973) (holding that "[w]here such a transaction involves commerce, within the meaning of the Federal Arbitration Statute, the state law and policy with respect thereto must yield to the paramount federal law."). Therefore, when [the parties] agreed that their employment contract would be subject to Georgia law, they probably intended that the federal arbitration law would apply rather than the Georgia common law.

*Booth v. Hume Publishing, Inc.*, 902 F.2d 925 (1990), at 928-929. In a footnote, the court noted that “Georgia [has] recently passed the new Georgia Arbitration Code, which is applicable to disputes arising on or after July 1, 1988. Ga. Code Ann. 9-9-2(a) (1988). Since the dispute at issue in this case arose in 1986, the new statute does not apply.” *Booth*, at 929, fn. 3. The strong inference is that the court was unwilling to permit the state’s common law to have displacing effect on the federal act even under a choice of law clause seemingly requiring that result, but that it was quite prepared to permit a modern state statute supportive of arbitration to override the application of the national statute.

the opinion in *North Augusta Associates*, inextricably linked to the agreement of the parties to apply that law,<sup>805</sup> the decision advanced the general viability of state arbitration law and its underlying policy by suggesting that the *consistency* of state law with federal law was a prime consideration in a court's decision to apply the state policy *vice* that expressed in the FAA. The opinion's endorsement of the general application of consistent "state procedural mechanisms" in the field of arbitration was especially significant and would figure prominently in the next ruling of the Georgia Court of Appeals where this point was controlling.<sup>806</sup>

At issue in *Simmons Company v. Deutsche Financial Services Corporation*,<sup>807</sup> handed down by the Georgia Court of Appeals some four years after its decision in *North Augusta Associates*, was just such a "state procedural mechanism" as had been contemplated in the earlier case and, consistent with the *North Augusta Associates* rationale, Judge Andrews, writing for the court, sustained a Georgia procedural norm even though it differed fundamentally from that sanctioned by the Federal Arbitration Act. The facts in *Simmons* were straightforward: the debtor under a written floor plan repurchase agreement containing an arbitration clause filed suit against its lender for breach of contract; the latter then moved to compel arbitration under an arbitration clause incontestably within the ambit of the federal law. When the trial court ruled

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<sup>806</sup> "Appellants agree," the court wrote in *North Augusta Associates*, "that the 'substantive portions' of the FAA apply to this case but contend that the FAA does not preempt the field of arbitration in that state procedural mechanisms that are consistent with the goals of the FAA are applicable." *North Augusta Associates*, at 791. "We agree," it concluded. *Id.*

<sup>807</sup> *Simmons Company v. Deutsche Financial Services Corporation*, 243 Ga. App. 85 (2000).



the arbitration agreement enforceable and issued its order compelling arbitration, the debtor-plaintiff appealed only to meet the objection that the Court of Appeals lacked jurisdiction over the matter at that point because, in essence, permitting an interlocutory appeal worked to deprive the lender of his right to arbitrate and subordinated that right to a judicial procedure, a result not permissible under the Federal Arbitration Act.<sup>808</sup> The Georgia court did not dispute the fact that the relevant provisions of the FAA<sup>809</sup> would not countenance an appeal given the procedural posture of the case, a result quite different from that provided for under the analogous provision of the Georgia Arbitration Code.<sup>810</sup> “Thus,” Judge Andrews wrote, “whether we have [appellate] jurisdiction depends on whether the FAA preempts the Georgia rule.”<sup>811</sup>

In reaching its conclusion as to the preemption by the FAA of the state rule of appealability of an interlocutory order compelling arbitration, the court first noted that “[t]he FAA preempts state laws that undermine enforcement of private arbitration agreements,” citing the *Southland Corp. v. Keating* decision of the United States Supreme Court: “... to the extent that [a state law] stands as an obstacle to the accomplishment and execution of the full purposes

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<sup>808</sup> *Ibid*, at 85-86.

<sup>809</sup> As explained by the Georgia Court of Appeals, “[u]nder § 16 of the FAA, once a court has determined that the parties agreed to arbitrate the claim, preliminary appellate review of that determination is limited. The limits are designed to promote the pro-arbitration policies of the FAA by minimizing the delays inherent in preliminary appellate review prior to arbitration. To accomplish this, § 16 prohibits appeals from interlocutory orders compelling arbitration. However, § 16 allows appeals from final decisions compelling arbitration. The opportunity for appellate review of an order compelling arbitration is not lost, but it must wait until after the arbitration award.” *Ibid*, at 87.

<sup>810</sup> “Georgia procedural law allows a preliminary appeal from an order by the trial court compelling arbitration,” the Court of Appeals noted, *citing* Phillips Construction Co. v. Cowart Iron Works, 250 Ga. 488 (1983). *See Simmons*, at 88.

<sup>811</sup> *Id.*

and objectives of Congress," that court had written,<sup>812</sup> "it will be preempted by the FAA."<sup>813</sup>

Reversing the logic of *Southland*, the Georgia court ruled:

It follows that procedural rules established by a state for the arbitration process that do not undermine the purposes and objectives of the FAA are not preempted.<sup>814</sup> ... As explained by the Supreme Court in *Volt*, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."<sup>815</sup>

For these reasons, the Court of Appeals concluded, " ... the Georgia rule allowing a preliminary appeal from an order compelling arbitration does not undermine the purposes or objectives of the FAA to enforce arbitration agreements,"<sup>816</sup> and, as a consequence, the FAA did not preempt the Georgia Arbitration Code in this procedural instance.<sup>817</sup>

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<sup>812</sup> 465 U.S. 1, (1984), at 16.

<sup>813</sup> *Simmons*, at 88, citing *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468 (1989), at 477.

<sup>814</sup> *Simmons*, at 88, citing *North Augusta Assoc., L.P. v. 1815 Exchange, Inc.*, 220 Ga. App. 790 (1996), at 791.

<sup>815</sup> *Simmons*, at 88.

<sup>816</sup> *Ibid*, at 88-89.

<sup>817</sup> The court expanded at some length on the reasons why, in its view, there was no fundamental conflict between the state and the national arbitration laws:

The timing of the right to appeal from an order compelling arbitration is a procedural matter which may delay but does not prevent enforcement of a valid arbitration agreement. See *Batton v. Green*, 801 S.W.2d 923 (Tex. App.1990); *Weston Securities Corp. v. Aykanian*, 46 Mass. App. Ct. 72, 703 N.E.2d 1185, 1189 (Mass. App.1998). Georgia's procedure allowing a preliminary appeal from an order compelling arbitration recognizes that, if the trial court erred in determining there was an enforceable arbitration

The Georgia Court of Appeals, again writing through Judge Andrews, had the occasion barely six months later to take up once again a number of the doctrinal themes which had been considered by the court in *Simmons* but, on this occasion, turning considerations of party autonomy in its decision in *Results Oriented, Inc. v. Crawford*<sup>818</sup> toward the affirmation of the application of federal, not state, arbitration law. In that case—litigation between a consumer purchaser, on the one hand, and a mobile home manufacturer and commercial loan maker, on the other, and touching on the former’s claims of unconscionability and violations of public policy—the court found no potential for state-federal clash because the record of the case did not reflect any active choice of law by the parties indicating anything other than the application of the FAA. In its view, the absence of any explicit choice of Georgia law, coupled together with specific reliance on the FAA in the terms of the consumer’s installment contract, indicated an intent of the parties that the federal statute control their transaction.<sup>819</sup> Still, the court seized the opportunity—an opportunity almost forced, a fair reading suggests—to drive home once again the possibility of the application of state arbitration law given the appropriate circumstance:

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agreement, a party may be forced to participate in an unwarranted arbitration proceeding. Phillips, 250 Ga. at 489, 299 S.E.2d 538. ... We conclude under the present facts that, assuming § 16 of the FAA would prohibit the appeal, it does not preempt Georgia's procedural rule allowing this appeal. Compare Primerica Financial Services, Inc. v. Wise, 217 Ga. App. 36-37, 41, 456 S.E.2d 631 (1995) (finding state signature requirements were preempted by the FAA).

*Simmons*, at 89. This logic compelled the court to reverse the decision in *Eure v. Cantrell Properties, Inc.*, 236 Ga. App. 427 (1999), which had held that § 16 of the FAA preempted Georgia’s rule permitting appeal of interlocutory orders compelling arbitration, a decision which, at the time when *Simmons* was handed down, was barely ten months old. *See Simmons*, at 89.

<sup>818</sup> *Results Oriented, Inc. v. Crawford*, 245 Ga. App. 432 (2000).

<sup>819</sup> *Ibid.*, at 437.

“Georgia has also enacted an Arbitration Act,” the court reminded the parties, “ ... evidencing the legislature’s conclusion that arbitration is not in violation of the public policy of this State and, therefore, cannot be said, per se, to be unconscionable. ‘What the Legislature allows cannot be contrary to public policy.’”<sup>820</sup>

The court’s pronounced sensitivity to values of party autonomy drove the decision, handed down four months later in February, 2001, in *Southwire Company, NSA, Ltd., v. American Arbitration Association*,<sup>821</sup> where the Court of Appeals, in an opinion written by Judge Phipps, stressed once again that the application of the FAA, normally implicated when a transaction in interstate commerce was in evidence, would nonetheless be displaced by an active choice of law by the parties to an arbitration agreement designating the application of Georgia law to their contract with respect to its validity, interpretation, and enforcement.<sup>822</sup> Although this *Volt*-based decision was hardly surprising at this juncture in the evolution of the court’s thinking on questions of FAA preemption of state arbitration law, the court went further and, in affirming the action by the trial court below in refusing to vacate an arbitral award under the terms of the

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<sup>820</sup> *Results Oriented*, at 437, quoting *NEC Technologies v. Nelson*, 267 Ga. 390 (1996) and *W. J. Cooney, P.C. v. Rowland*, 240 Ga. App. 703 (1999). The court reiterated once again the holding in *Southland Corporation* to the effect that the Federal Arbitration Act preempts only those state laws that undermine enforcement of private arbitration agreements, citing *Southland Corp. v. Keating*, 465 U. S. 1 (1984), at 16, and the cautionary language of *Volt* that it is only “to the extent that a state law stands as an obstacle to be accomplishment and execution of the full purposes and objectives of the Congress,’ [that] it will be preempted by the FAA,” quoting *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468 (1989), at 477, as these references appeared in the court’s recent opinion in *Simmons Company v. Deutsche Financial Services Corporation*, 243 Ga. App. 85 (2000), at 88 (1).

<sup>821</sup> *Southwire Company, NSA, Ltd., v. American Arbitration Association*, 248 Ga. App. 226 ( 2001).

<sup>822</sup> *Southwire*, at 227.

FAA, insisted that the erroneous application of the federal statute by the trial court did not necessarily mandate a reversal on appeal. Rather, Judge Phipps wrote, it simply meant that the Court of Appeals would “review the trial court’s confirmation of the arbitration award under the standards of the GAC as set forth in OCGA § 9-9-13 (b), rather than under the comparable standards of the FAA as found in 9 USC § 10 (a).” Since the court found no significant difference relevant in the case in the substance of the two laws, state and federal, with respect to the vacatur of awards, it affirmed under the provisions of the Georgia Arbitration Code the action taken by the trial judge under the Federal Arbitration Act.<sup>823</sup>

*Southwire* was but a recent example of a not altogether unhealthy tendency on the part of Georgia appellate judges to review simultaneously the action of a trial judge under *both* the Georgia Arbitration Code *and* the Federal Arbitration Act, where possible because of the substantial identity of the substantive provisions in the two statutory schemes.<sup>824</sup> The latest such instance came in early 2004 when, in *BellSouth Corporation v. Forsee*,<sup>825</sup> a decision of the Georgia Court of Appeals written by Judge Phipps, issues as to the arbitrability of an executive

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<sup>823</sup> *Southwire Company*, at 229. Judge Phipps was joined in this opinion by Judges Barnes and Smith, the latter of whom was the author of the conceptually consistent opinion in *Results Oriented, Inc., v. Crawford*, 245 Ga. App. 432 (2000).

<sup>824</sup> *See, e.g.*, *Barge v. St. Paul Fire & Marine Insurance Company*, 245 Ga. App. 112 (2000), at 113-114 (citations and footnotes omitted) [“Under both federal and Georgia law, arbitration is a matter of contract, meaning that arbitrators derive their authority to resolve disputes only from the parties’ agreement. Thus, the extent of that authority depends on the language of the contract.”]. *Cf.* *Leigan v. Sears Roebuck & Company*, 248 Ga. App. 145 (2001), at 148, where the court-approved, *sub silentio*, the action of a trial court in denying a motion to compel arbitration of a fraud claim premised on considerations of both the Georgia Arbitration Code and the Federal Arbitration Act. *See also* *Camp v. Columbus*, 252 Ga. 120 (1984).

<sup>825</sup> *BellSouth Corporation v. Forsee*, 2004 WL 170145 (2004).

employment contract were analyzed under both the Georgia and the federal arbitration statutes.<sup>826</sup>

Such an approach on the part of Georgia's appellate judges underscores and emphasizes the substantial community of interest which is shared by both state and federal governments in the orderly and rational administration of a systematic régime of laws governing extrajudicial resolution of disputes generally and arbitration in particular. Georgia common law authorities following the older *West Point-Pepperell*, *DiMambro*, and *ADC Construction* rationale seemed for long decades to threaten the viability of arbitral policy within the State of Georgia. The vitality of Georgia-generated arbitration law and policy, a policy with a rich history stretching back almost three centuries, now –as a consequence of new strains of thought more sensitive to

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<sup>826</sup> Gary Forsee had been a vice chairman of the domestic operations division of BellSouth Corporation when he left that company to take up employment with a major competitor of BellSouth, Cingular Wireless Corporation. BellSouth filed suit to enjoin Forsee from taking a position with the competitor, charging that he was familiar with information within BellSouth which was both confidential and subject to trade secret restrictions. Forsee's contract of employment with BellSouth contained a noncompetition clause as well as a provision for the arbitration of disputes arising under the agreement. When BellSouth sought to enforce the restriction against taking employment with the competitor, a temporary restraining order against Forsee was initially issued by the Superior Court of Fulton County. After this order was later rescinded, BellSouth sought to enforce the arbitration provision in the contract, in response to which Forsee raised questions as to the arbitrability of the dispute. With respect to the law applicable to this issue, the court noted, "the parties agree that the employment agreement at issue involves interstate commerce, and that the Federal Arbitration Act (FAA), as well as consistent provisions of the Georgia Arbitration Code (GAC) apply." *Forsee*, at 2. Judge Phipps' emphasis on the application of compatible and consistent provisions of the Georgia Arbitration Code, together with the applicable provisions of the FAA, is reminiscent, of course, of the approach she adopted in the earlier *Southwire* opinion which was similarly protective of the integrity of state arbitration policy. After an extensive analysis of federal law regarding arbitrability under the provisions of the FAA, Judge Phipps concluded that "the GAC is in accord," in support of which conclusion she reviewed in some detail Georgia statutory and case authority bearing on the issue. *See Forsee*, at 2.

and appreciative of the vital role of the states of the American union in the formulation of dispute resolution régimes— seems assured.

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O.C.G.A. § 9-9-32 (repealed 1988)

O.C.G.A. § 9-9-32 (2001 Supp.)

O.C.G.A. § 9-9-33 (2001 Supp.)

O.C.G.A. § 9-9-33 (repealed 1988)

O.C.G.A. § 9-9-34 (repealed 1988)

O.C.G.A. § 9-9-34 (2001 Supp.)

O.C.G.A. § 9-9-35 (2001 Supp.)

O.C.G.A. § 9-9-35 (repealed 1988)

O.C.G.A. § 9-9-36 (2001 Supp.)

O.C.G.A. § 9-9-36 (repealed 1988)

O.C.G.A. § 9-9-37 (2001 Supp.)

O.C.G.A. § 9-9-37 (repealed 1988)

O.C.G.A. § 9-9-38 (2001 Supp.)

O.C.G.A. § 9-9-38 (repealed 1988)

O.C.G.A. § 9-9-39 (repealed 1988)

O.C.G.A. § 9-9-39(a), (c) (2001 Supp.)

O.C.G.A. § 9-9-39(a) (2001 Supp.)

O.C.G.A. § 9-9-40 (repealed 1988)

O.C.G.A. § 9-9-40 (2001 Supp.)

O.C.G.A. § 9-9-41 (repealed 1988)

O.C.G.A. § 9-9-41 (2001 Supp.)

O.C.G.A. § 9-9-42 (repealed 1988)

O.C.G.A. § 9-9-42 (2001 Supp.)

O.C.G.A. § 9-9-43 (repealed 1988)

O.C.G.A. § 9-9-44 (repealed 1988)

O.C.G.A. § 9-9-45 (repealed 1988)

O.C.G.A. § 9-9-46 (repealed 1988)

O.C.G.A. § 9-9-47(a) (repealed 1988)

O.C.G.A. § 9-9-47(b) (repealed 1988)

O.C.G.A. § 9-9-48 (repealed 1988)

O.C.G.A. § 9-9-49 (repealed 1988)

O.C.G.A. § 9-9-50 (repealed 1988)

O.C.G.A. § 9-9-51(a) (repealed 1988)

O.C.G.A. § 9-9-51(b) (repealed 1988)

O.C.G.A. § 9-9-51(c) (repealed 1988)

O.C.G.A. § 9-9-60 (2001 Supp.)

O.C.G.A. § 9-9-61 (2001 Supp.)

O.C.G.A. § 9-9-70 (repealed 1988)

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O.C.G.A. § 9-9-82 (2001 Supp.)

O.C.G.A. § 9-9-83 (repealed 1988)

O.C.G.A. § 9-9-83 (2001 Supp.)

O.C.G.A. § 9-9-85 (repealed 1988)

O.C.G.A. § 9-9-85 (2001 Supp.)

O.C.G.A. § 9-9-86(a), (b), (c), (d)(1)-(3) (repealed 1988)

O.C.G.A. § 9-9-86 (2001 Supp.)

O.C.G.A. § 9-9-87 (repealed 1988)

O.C.G.A. § 9-9-88 (2001 Supp.)

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O.C.G.A. § 9-9-88(b) (repealed 1988)

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O.C.G.A. § 9-9-88(e) (repealed 1988)

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O.C.G.A. § 9-9-89 (2001 Supp.)

O.C.G.A. § 9-9-89(a) (repealed 1988)

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O.C.G.A. § 9-9-90(b) (repealed 1988)

O.C.G.A. § 9-9-91(a)(1)-(3) (repealed 1988)

O.C.G.A. § 9-9-91(a)(1)-(3) (repealed 1988)

O.C.G.A. § 9-9-93(b)(1)-(3) (repealed 1988)

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O.C.G.A. § 9-9-94 (repealed 1988)

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O.C.G.A. §10-1-784 (2001 Supp.)

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O.C.G.A. § 10-1-786 (a) (2001 Supp.)

O.C.G.A. § 10-1-786 (b) (1)-(4) (2001 Supp.)

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O.C.G.A. § 48-5-311(f)(3) (2001 Supp.)

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**Georgia Constitution:**

1777 Ga. Const. § 279

1983 Ga. Const. Art. 6, § I, ¶ 1

**Federal Statutes:**

Federal Arbitration Act [Chapter One], ch. 392, §1, 62 Stat. 669 (1947), codified as 9

U.S.C. §§ 1-16

Federal Arbitration Act [Chapter Two], Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692, codified

as 9 U.S.C. §§ 201-208

Federal Arbitration Act [Chapter Three], Pub .L. 101-369, § 1, Aug. 15, 1990, 104 Stat. 448,

codified as 9 U.S.C. §§ 301-307.

Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993, codified as 28

U.S.C. §§ 651-658

**Other:**

Barbara N. Berkman, *Will Be Held For Study: House Says No To Arbitration Bill*,

FULTON COUNTY DAILY REPORT, March 6, 1987, at 1.

MEMORANDUM, *Bar Sponsorship of Legislative Proposal to Amend Arbitration Statute*, from E.

Wycliffe Orr, Sr., Chair of the Committee To Study Practicality of Mediation and Arbitration of the State Bar of Georgia, to the Advisory Committee on Legislation of the State Bar of Georgia, dated October 23, 1986.

UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES (adopted by the United Nations Commission on International Trade Law on 28 Apr 1976).

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