THE MIDNIGHT CLAUSE: FROM DARKNESS TO DAYLIGHT

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I. INTRODUCTION.

A. ***My Background***. I was (i) a CPA with a Big Eight accounting firm before going to law school; (ii) a partner in three large law firms in Atlanta during my first 16-1/2 years in private practice, where I practiced in the corporate and tax areas; (iii) the General Counsel of a public technology company, now known as Premiere Global Services, Inc. (NYSE: PGI), for eight years; (iv) the Chief Financial Officer of Premiere on two different occasions during four of those years; and (v) the head of investor relations for Premiere during two of those years (which I can say without hesitation was the worst job I have ever had). I first became involved with alternative dispute resolution ("**ADR**") as a result of 25 shareholder lawsuits that were filed in 1998 against Premiere, its directors and certain executive officers (including me in my capacity as CFO), after two of our biggest customers went under within weeks of each other; 24 of those cases were settled through mediation. Since leaving Premiere in 2003 I have been a mediator and arbitrator, affiliated with Henning Mediation & Arbitration Service, Inc. ("**Henning**") in Atlanta, where I specialize in commercial and business disputes. I also returned to practicing law in early 2007, joining Friend, Hudak & Harris, LLP, a small telecommunications/technology firm I had worked with at Premiere (they were our primary outside telecom counsel), where I again practice in the corporate and tax areas. I now split my time between my ADR practice and my law practice

B. ***The Problem***. During my first 16-1/2 years in private practice I worked on quite a few M&A and other significant transactions, and I know from personal experience that the term "*midnight clause*" is well deserved. This refers to the dispute resolution clause, and in particular the arbitration clause, because all too often it is addressed at the end of the contract negotiations (and many times after midnight) as more or less an "afterthought," with very little consideration given to the consequences.[1] A typical scenario would be where a litigator receives a call or e-mail at the 11th-hour from one of the corporate

[1] I was retained as an ADR consultant involving a post-closing dispute following the sale of a business for approximately $100 million, in which the purchase agreement had 88 numbered sections, with the "Dispute Resolution" section being number 87.

associates working on the deal, who asks the litigator to send him or her a "standard" or "boilerplate" arbitration clause. Unfortunately, there is no such thing.

i. Each arbitration clause should be carefully drafted to fit the needs of the parties and the deal, which involves taking into account, among other things, the likely types of disputes, the parties' long-term relationship, and the applicable laws. Clearly, one size does not fit all. A poorly drafted or incomplete arbitration clause can do more harm than good, and paying attention to dispute resolution issues at the time the contract is drafted can avoid costly surprises later on, when the ability of the now disputing parties to agree on anything has diminished significantly. It is a classic case of "you can pay me now or pay me later."

ii. The primary reason the arbitration clause gets short shrift is that the deal lawyers have more important things on their collective minds, such as negotiating the best business deal for their client.

a. In one article I read in preparing this paper, the author stated:

> Another early step your litigation counsel will take in preparing for discovery will be interviewing the key employees involved. Depending on the nature of the contract (and therefore the dispute), these employees might include accounting personnel, sales reps, technicians, administrators, etc. Interviewing these individuals before you draft your arbitration clause—to learn how they maintain their files—will save time for your legal team (and therefore money) once the arbitration is under way, enabling you in some cases not only to specify the types of data and information that will be preserved and produced in the event of a dispute, but perhaps even identify the custodians (or at least their positions) as well.[2]

b. While such an approach may result in a better arbitration clause, it is just not practicable in most transactions.

C. ***Goal of this Presentation***. The goal of this presentation is to provide a framework to lawyers (both in-house and outside counsel) for drafting effective arbitration clauses for binding[3] domestic

[2] Victoria A. Kummer, *Is Your Arbitration Clause Helping or Hurting You*?, N.Y.L.J., April 14, 2011.

[3] Nonbinding arbitration will not be discussed in this paper.

commercial arbitrations, focusing primarily on the Georgia Arbitration Code, O.C.G.A. § 9-9-1, *et seq.* (the "**Georgia Code**"), and the United States Arbitration Act (a/k/a the Federal Arbitration Act), 9 U.S.C. § 1, *et seq.* (the "**FAA**").

II. **ARBITRATION IN GEORGIA**. For the reasons discussed below, it is very important that lawyers in Georgia be aware of the consequences of providing for binding arbitration in contracts governed by Georgia law.

A. Georgia Code Section 9-9-13(b) provides that an arbitration award may be vacated on the following very limited grounds:

> (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;
> (4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection; or
> (5) The arbitrator's manifest disregard of the law.

"Manifest disregard of the law" was added to Section 9-9-13(b) in 2003, and Georgia is currently the only state that expressly provides for "manifest disregard of the law" as a statutory ground for vacatur.[4] While I have no statistics to confirm this, since 2003 Georgia Code Section 9-9-13(b)(5) seems to have been the most frequently litigated ground for vacatur.

B. In *ABCO Builders, Inc. v. Progressive Plumbing, Inc.*,[5] the Georgia Supreme Court stated:

> Therefore, to prove that a manifest disregard of the law has occurred, a party wishing to have an arbitration award vacated must provide evidence of record that, not only was the correct law communicated to an arbitrator, but that the arbitrator intentionally and knowingly chose to ignore that law despite the fact that it was correct. . . . [T]his showing is an extremely difficult one to make, especially in light of the fact that an arbitrator is not required to make findings of fact or state his or her rationale in reaching decisions.[6]

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[4] DOUGLAS H. YARN & GREGORY TODD JONES, GEORGIA ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA § 9:59, at 294 (3d ed. 2006) [hereinafter YARN & JONES].

[5] 282 Ga. 308, 647 S.E.2d 574 (2007).

[6] 282 Ga. at 309, 647 S.E.2d at 575 (emphasis added).

The Court went on to state that "there must be concrete evidence of [the arbitrator's] intent [to purposely disregard the law] either in the findings of the arbitrator, if he or she chooses to make such findings, or in the transcript of the arbitration hearing, if the parties choose to have the hearing transcribed."[7]

i. Thus, under *ABCO Builders*, a mere error of law does not constitute "manifest disregard," but instead it must be shown that the arbitrator "intentionally and knowingly chose to ignore" the law.

ii. It is important to note that in most cases this will be almost impossible to do because the most common type of arbitration award (the standard award) contains no rationale and no findings of fact or conclusions of law, and most arbitration proceedings are not transcribed. As stated by the Georgia Court of Appeals, "a litigant seeking to vacate an arbitration award has an 'extremely difficult' task."[8]

C. In *Hall Street Assocs., L.L.C. v. Mattel, Inc.*,[9] the United States Supreme Court held that judicial review of an award under the FAA is limited to the narrow grounds enumerated in Sections 10 (to vacate an award) and 11 (to modify or correct an award) of the FAA, and the FAA does not permit parties to contractually expand such grounds.

D. In *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*,[10] the Georgia Court of Appeals held, on an issue of first impression (and "guided by" *Hall Street*), that the Georgia "Arbitration Code does not permit contracting parties who provide for arbitration of disputes to contractually expand the scope of judicial review that is authorized by statute."[11]

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[7] *Id*.

[8] *BMW Bank of North America v. Short*, 300 Ga. App. 430, 431, 685 S.E.2d 390, 391 (2009).

[9] 552 U.S. 576, 128 S. Ct. 1396 (2008).

[10] 299 Ga. App. 614, 683 S.E.2d 40 (2009), *aff'd*, 287 Ga. 408, 696 S.E.2d 663 (2010).

[11] 299 Ga. App. at 617, 683 S.E.2d at 43.

E. Considering the finality of most arbitration awards in Georgia, it is clear that before including an arbitration clause in a contract governed by Georgia law, the consequences of such inclusion should be fully understood by the attorney and his or her client.

III. THE SEVEN DEADLY SINS. In 2003 John Townsend published an article in the February - April issue of *Dispute Resolution Journal* titled "DRAFTING ARBITRATION CLAUSES: Avoiding the 7 Deadly Sins." The premise of that article was that "while it is difficult to generalize about what would make a 'perfect' [arbitration] clause, it is not nearly as difficult to identify some of the features that make for a bad one." The article identified "seven of the most damning 'sins' that plague arbitration clauses," and I believe it would be worthwhile to revisit them here.[12]

A. ***Equivocation***. Referred to as the "cardinal sin" of arbitration clause drafting, this refers to the failure to make it clear that the parties have agreed to binding arbitration. "Because arbitration is a creature of contract, if there is no contract, there is no agreement to arbitrate." The example given in the article is: "*In case of dispute, the parties undertake to submit to arbitration, but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction*."

B. ***Inattention***. This sin occurs when an arbitration clause is drafted without sufficient attention being paid to the transaction to which it relates. A well-designed arbitration clause fits the circumstances of the transaction as well as the needs of the parties.

C. ***Omission***. This sin is committed when the drafter omits a crucial or useful element from an arbitration clause, which can result in the parties agreeing to arbitrate, but without any guidance concerning how or where to do so. The example given in the article is: "*Any disputes arising out of this Agreement will be finally resolved by binding arbitration*."

i. The article states that because this clause clearly requires the parties to arbitrate disputes it is probably enforceable, but "it does not achieve the goal of an arbitration clause, which

[12] Except as otherwise indicated, all quotes in Section III are from the Townsend article.

is to stay out of court." That is, unless the details regarding the arbitration can be agreed to by the parties, they will have to go to court to have an arbitrator selected for them.

ii. Several years ago I was appointed as one of the arbitrators under the following arbitration clause, which clearly suffered from the sin of omission, as well as several others: "*Any dispute shall go to binding arbitration with . . . each [party] choosing an arbitrator. Should the two arbitrators not agree regarding the dispute, they will then pick a third arbitrator whose opinion shall prevail and be determinative of any disputed issue*." The arbitration never took place because the party who appointed me filed for bankruptcy.

D. ***Over-Specificity***. This is the opposite of the sin of omission; *i.e.*, the drafter provides too much detail. As described in the article, "[d]rafters occasionally take the job of creating an arbitration clause as a challenge to show how many terms they can invent." This can result in a clause that is excessively detailed and extremely difficult to put into practice.

i. The example given in the article is:

> *The Arbitration shall be conducted by three arbitrators, each of whom shall be fluent in Hungarian and shall have twenty or more years of experience in the design of [computer chips], and one of whom, who shall act as chairman, shall be an expert on the law of the Hapsburg Empire.*

E. ***Unrealistic Expectations***. This is a companion sin to over-specificity, and usually occurs when an arbitration clause is unrealistically deadline driven.

i. The example given in the article is:

> *The claimant will name its arbitrator when it commences the proceeding. The respondent will then name its arbitrator within seven (7) days, and the two so named will name the third arbitrator, who will act as chair, within seven (7) days of the selection of the second arbitrator. Hearings will commence within fifteen (15) days of the selection of the third arbitrator, and will conclude no more than three (3) days later. The arbitrators will issue their award within seven (7) days of the conclusion of the hearings.*

ii. While there are situations that may require tight time limits, "too tight a timeframe for an arbitration can cripple the process before it gets started," with the resultant risk of collateral litigation.

F. ***Litigation Envy***. The article notes that some drafters just cannot let go of the familiar security blanket of litigation, which can result in a clause that calls for the arbitration to follow court rules, and often produces "predictable and needlessly expensive wheel-spinning."

i. The example in the article is:

> *The arbitration will be conducted in accordance with the Federal Rules of Civil procedure applicable in the United States District Court for the Southern District of New York, and the arbitrators shall follow the Federal Rules of Evidence.*

ii. The article points out that there are many good sets of procedural rules available that can be incorporated by reference into the arbitration clause, and "[a]ny one of them is preferable to requiring an arbitration to be conducted according to the rules governing litigation."

iii. The article states that some drafters "also manifest litigation envy when they are reluctant to trust the result and provide for expanded review of the arbitration award." This article was written in 2003, before *Hall Street* was decided, which, for the reasons discussed above, has effectively ended this type of litigation envy.

G. ***Overreaching***. This sin occurs when the drafter cannot resist the urge to tilt the arbitration clause in favor of his or her client, and is most likely to occur when the parties have unequal bargaining positions.

IV. DRAFTING EFFECTIVE ARBITRATION CLAUSES. Turning from what should be avoided, this section will focus on what should be included in an arbitration clause.[13] As discussed below, parties often choose to conduct their arbitration with the assistance of an arbitral institution (*e.g.*, the American Arbitration Association ("**AAA**"), Judicial Arbitration and Mediation Services, Inc. ("**JAMS**"), and Henning, and pursuant to such institution's procedural rules (which include many of the provisions discussed below).

A. ***Fundamental Provisions***. While each arbitration clause should be drafted to fit the needs of the parties and the deal, there are certain fundamental provisions that should be included in all arbitration clauses.

i. **Agreement to arbitrate**. The parties' intent to resolve their disputes by arbitration should be clearly stated in the arbitration clause. In addition, the arbitration clause should state that any award will be "final and binding" to make it clear that the parties intend the award to be enforceable by the courts without any review of the sufficiency of the evidence underlying the award. It is also important to include all the relevant parties as signatories to the arbitration clause, such as the parent of a contracting corporation, and the entity that is the guarantor of a contracting party's obligations.

ii. **Scope**. The arbitration clause should be clear as to what types of disputes are subject to arbitration; ambiguity can result in protracted, expensive litigation over what is

[13] Two excellent publications dealing with dispute resolution clauses are *Drafting Dispute Resolution Clauses - A Practical Guide*, published by the AAA (https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540), and the *JAMS Clause Workbook - A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts* (http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf) (the "**JAMS Clause Workbook**"). In addition, in December 2012 the AAA launched *ClauseBuilder*, a web-based tool designed to assist in drafting clear and effective commercial arbitration and mediation clauses. (https://www.clausebuilder.org/cb/faces/index?_afrLoop=459147364838877&_afrWindowMode=0&_adf.ctrl-state=2op21thio_4).

arbitrable. In an *ad hoc* arbitration (see discussion below), the arbitration clause should also specify how a party initiates the arbitration process.

a. Narrow. If the parties want to limit arbitration to only certain types of disputes (*e.g.*, contract disputes or disputes under a designated dollar amount), the arbitration clause should be drafted to cover only such disputes. For example, if only contract disputes will be subject to arbitration, the following language (or something similar) should be included in the arbitration clause: "*All disputes arising under this Agreement shall be determined by final and binding arbitration* . . . ."

b. Broad. On the other hand, if the parties intend that all potential disputes should be arbitrated, including tort claims, fraud in the inducement, etc., the following language (or something similar) should be included in the arbitration clause: "*All disputes arising out of, connected with, or relating in any way to this Agreement, shall be determined by final and binding arbitration* . . . ." Basically, this provides that every dispute will be subject to arbitration unless restricted by law or public policy.

c. Hybrid. Sometimes a contract will include a general arbitration clause as well as a more specific arbitration clause that covers a very limited category of disputes.

1. Disputes involving post-closing purchase price adjustments in connection with the sale of a business are particularly well suited for specific arbitration clauses.

d. Arbitrability. In general, this refers to the jurisdiction of the arbitrator; that is, does a court or the arbitrator decide disputes over the validity and enforceability of the arbitration clause, or whether a particular substantive dispute is within the scope of the arbitration clause? Under both the Georgia Code and the FAA, the threshold question of whether parties to a contract have agreed to arbitrate a dispute is normally a matter for a court to decide; however, if the parties have clearly and unmistakably provided in the

arbitration clause that the arbitrator will decide questions of arbitrability, then the arbitrator has jurisdiction to decide them.

1. If the parties want the arbitrator is to have this power, the arbitration clause should include the following language (or something similar): "*All disputes arising [under] [out of, connected with, or relating in any way to] this Agreement, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by final and binding arbitration* . . ."

2. The AAA C*ommercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)* (the "**AAA Commercial Rules**")[14], the JAMS *Comprehensive Arbitration Rules & Procedures* (the "**JAMS Rules**"), and the Henning *Rules for Arbitration* (the "**Henning Rules**"), all provide that an arbitrator has the power to rule on his or her jurisdiction.

iii. ***Ad hoc* or administered arbitration**.

a. *Ad hoc* arbitration refers to an arbitration in which the parties have chosen to conduct the arbitration without the assistance of an arbitral institution. While *ad hoc* arbitration avoids the administrative fees charged by arbitral institutions (which can be substantial), the trade-off is that the parties will assume the administrative and planning responsibilities generally performed by the arbitral institution. For obvious reasons, *ad hoc* arbitration requires cooperation among the parties; however, the parties may not be in a cooperative mood after a dispute arises, which can be problematic. Without assistance from a neutral third party, the disputing parties often have difficulty reaching agreement

[14] As of October 1, 2013, a number of significant amendments to the AAA Commercial Rules became effective.

on such basic procedural matters such as the number of arbitrators, leading to undue delay and a possible lawsuit by one of the parties to move the arbitration along.

1. In an *ad hoc* arbitration the parties will rarely want to negotiate dispute resolution procedures or rules from scratch; thus, the designation of *ad hoc* arbitration rules is advisable to provide a framework for conducting the arbitration, such as the *CPR Rules for Non-Administered Arbitration* (http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/600/2007-CPR-Rules-for-Non-Administered-Arbitration.aspx) (the "**CPR Rules**") published by the International Center for Conflict Prevention and Resolution (the "**CPR Institute**").[15]

2. If an arbitration is *ad hoc* and the arbitration clause does not provide for the arbitration to proceed in the absence of a party, the initiating party will have to petition the court to compel the other party to arbitrate. Both the Georgia Code and the FAA provide procedures to compel arbitration.

b. An administered arbitration is one in which the parties have chosen to conduct their arbitration with the assistance of an arbitral institution (such as AAA, JAMS or Henning), and pursuant to such institution's procedural rules (hereinafter referred to generically as "**Arbitral Rules**"). Arbitral Rules are neutral and self-executing; *i.e.*, they provide for the arbitration to move forward despite the refusal of a party to respond to the initial arbitration demand or to appear at the hearing. Arbitral institutions generally provide administrative, logistical and secretarial support to the parties, and also handle the arbitrators' fees and billing. Of course, all of this comes at a cost, which can be significant.

[15] On July 1, 2013 the CPR Institute published its Administered Arbitration Rules (http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/785/7113-Administered-Arbitration-Rules-Effective-July-1-2013.aspx).

1. Generally, with the exception of fee schedules, most Arbitral Rules allow the parties to vary the procedures set out in such Rules.

2. Because Arbitral Rules are revised from time to time, the arbitration clause should specify what version of the Rules will apply (*e.g.*, "as in effect on the date of this Agreement" or "as such rules may be amended from time to time"). Most Arbitral Rules provide that they will apply in the form in effect at the time when the arbitration process commenced, unless otherwise agreed by the parties.

3. The AAA and JAMS both have special rules designed for specific industries or types of disputes, such as construction and employment disputes.

4. It is possible to use one arbitral institution's Arbitral Rules and have another arbitral institution administer the arbitration, unless the arbitration clause provides that the Arbitral Rules of the administering arbitral institution will be used. For example, I have served as an arbitrator in several arbitrations administered by Henning where the parties' arbitration clause called for the AAA Commercial Rules to be used.[16]

iv. **Number, selection and qualifications of the arbitrators**.

a. It is generally advisable for the parties to specify the number of arbitrators in the arbitration clause and how they will be selected. The naming of a specific individual as the arbitrator should be avoided, since that person may not be available (or even alive) at the time of a dispute.

b. Some of the advantages of using a sole arbitrator are that it is generally easier and quicker to select one arbitrator than three; one arbitrator is less expensive than

[16] Rule R-2 of the AAA Commercial Rules provides: "Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so."

three; scheduling hearings is easier because there is only one arbitrator's schedule involved; and the final award generally will be issued faster than with three arbitrators because there is no need to get input and agreement from the two other arbitrators.

c. The primary advantage of having three arbitrators is that it lessens the chance of an "outlier" award; that is, having more than one arbitrator will tend to moderate an award, and the panel members are more likely to compromise their respective views in order to agree upon a final award. Some of the disadvantages are that it generally takes longer to select three arbitrators than one; a three-member panel will be much more expensive than a sole arbitrator; the proceedings will probably take longer to complete because it will be harder to schedule hearing dates that are acceptable to all parties and to all arbitrators; and it will often take longer for the final award to be issued because of the need to get input and agreement among the arbitrators, both in making decisions and in drafting the award.

d. The parties may want to consider providing for one arbitrator for certain types of disputes (such as those under a designated dollar amount), and three arbitrators for all other disputes.

e. The AAA Commercial Rules provide that if the number of arbitrators is not specified in the arbitration clause, then the dispute will be heard and determined by one arbitrator, unless the AAA determines that three should be appointed. The JAMS Rules provide that the arbitration will be conducted by one arbitrator unless all parties agree otherwise. The Henning Rules provide that if the parties cannot agree on the number of arbitrators Henning may designate the number.

f. If three arbitrators are to be used, a common method of selection is the party-appointed method, in which each party selects one arbitrator, and then the two party-appointed arbitrators select the third arbitrator to serve as the chair. Under both the AAA

Commercial Rules and the JAMS Rules, the party-appointed arbitrators must be neutral and independent of the appointing party, unless the parties have agreed that the party-appointed arbitrators will be non-neutral. The Henning Rules do not provide for non-neutral arbitrators.

1. Thus, if the parties intend that their party-appointed arbitrators are to serve in a non-neutral capacity, and the applicable Arbitral Rules allow non-neutral arbitrators, this should be clearly stated in the arbitration clause.

g. Another method is the list method, in which the arbitral institution provides a list of potential arbitrators to the parties, and the parties strike the persons they do not want and rank the remaining names in their order of preference.

1. Under the AAA Commercial Rules, JAMS Rules and Henning Rules, if the parties are unable to agree on an arbitrator some variation of the list method will be used.

h. One of the major advantages of arbitration is that the parties can specify in the arbitration clause the qualifications that a potential arbitrator should have (*e.g.*, someone who is in the same industry as the disputing parties or has substantive knowledge in the disputed area), although too much specificity should be avoided because it can significantly reduce the number of available and qualified arbitrators.

1. This works well with three-member panels where it is possible to require that one of the arbitrators have certain specified qualifications (*e.g.*, must be an accountant or engineer), which will ensure that the desired technical expertise is represented on the panel, while also having a chair with experience in the arbitration process.

i. Virtually all Arbitral Rules provide for methods to select replacement arbitrators in the event an arbitrator is unable to continue to serve.

j. If an arbitration is *ad hoc*, the arbitration clause should provide for a default appointing authority to ensure appointment of the arbitrator in the first place, and for the arbitrator's replacement if he or she is no longer able to serve. The Georgia Code and the FAA both provide that a court, upon application of either party, can appoint one or more arbitrators when the parties have not included a method of appointment in their arbitration clause, the agreed method fails or is not followed, or the arbitrators fail to act and no successors have been appointed; however, under the FAA, the court will appoint only one arbitrator unless otherwise provided in the arbitration clause.

v. **Location**. The parties should agree to the location of the arbitration in their arbitration clause. While this is not as critical as in international arbitrations, it can still have some important implications. Most Arbitral Rules provide that the parties can designate the location of the arbitration in their arbitration clause, but absent such designation, and if the parties cannot agree on one after the arbitration has been initiated, the arbitrator will designate the location. Under the FAA, the parties' choice of the location of the arbitration must be honored; however, under the Georgia Code the arbitrator has the power to choose the time and place of hearings in spite of the parties' agreement. In an *ad hoc* arbitration under the FAA, the arbitration will be held in the jurisdiction of the court in which the motion to compel was filed.

vi. **Interim measures**.

a. Most Arbitral Rules provide that arbitrators can grant interim relief unless the arbitration clause limits that authority. If an arbitrator grants interim relief, it would be in the nature of an interim award that would require a confirmation order from the court to be enforced.

1. The AAA Commercial Rules permit a party to seek emergency relief before the arbitrator has been appointed, by notifying the AAA and the other parties to the arbitration, and the AAA will then appoint an emergency arbitrator

upon one day's notice. This allows the parties to an arbitration agreement to seek the equivalent of a temporary restraining order or preliminary injunction.

b. Under the Georgia Code a party to an arbitration can apply to the court for an order of attachment or a preliminary injunction, but the court's power to grant such interim relief is limited to the grounds that the arbitrator's award would otherwise be ineffectual. An arbitrator's authority under the FAA to order provisional relief is broad and not limited to the subject matter of the dispute.

c. A party can waive its right to enforce an arbitration clause by engaging in actions that are inconsistent with the right to arbitrate, which can include applying to a court for interim relief before or during an arbitration. The AAA Commercial Rules and the JAMS Rules both provide that a request for interim measures by a party to a court will not be considered a waiver of the party's right to arbitrate.

d. The parties can avoid any confusion by specifically providing in the arbitration clause that a party does not waive its right to arbitrate by applying to a court for provisional relief.

vii. **Governing law**. Most commercial contracts include a general choice of law clause to govern the interpretation and enforcement of the contract; however, what law governs the interpretation and enforcement of the arbitration clause is a different issue. If the contract involves interstate commerce, federal law preempts state statutes and the FAA applies; however, if the arbitration clause provides that the arbitration will be conducted in accordance with state law, the FAA will not apply even if interstate commerce is involved.

a. Thus, if an interstate contract with an arbitration clause provides that Georgia law will be the governing law of the contract, the Georgia Code will apply to the arbitration to the extent it does not conflict with the FAA. The parties could also provide

that Georgia law will be the governing law of the contract, but the FAA will apply to the arbitration clause.

viii. **Type of award**. The only formal requirements for an award under the Georgia Code and the AAA Commercial Rules, JAMS Rules and Henning Rules, are that it be in writing and signed by a majority of the arbitrators. A broad arbitration clause and most Arbitral Rules give the arbitrator the power to grant any remedy or relief that the arbitrator deems just and equitable.

There are two main types of awards: a "standard award" (also called a "general," "regular" or "bare" award) that includes only the relief granted and to whom, and does not include any reasons supporting the award, and a "reasoned award" that includes the reasoning of the arbitrator.[17] In practice, most awards are standard awards, and an arbitrator will issue a reasoned award only if required by the arbitration clause or the applicable Arbitral Rules.

a. The AAA Commercial Rules provide that the arbitrator is not required to render a reasoned award unless the parties request such an award in writing prior to the arbitrator's appointment, unless the arbitrator determines that a reasoned award is appropriate. The JAMS Rules, on the other hand, provide that unless all the parties agree otherwise, an award shall contain a concise written statement of the reasons for the award. The Henning Rules provide that an award may or may not state the reasoning on which it rests, as decided in the discretion of the arbitrator.

b. Regarding what constitutes a "reasoned award," the Eleventh Circuit Court of Appeals has stated:

> To determine whether the panel in this case exceeded its powers, then, we must first decipher what constitutes a "reasoned award," a somewhat ambiguous term left undefined by the FAA, the Arbitration Rules, and the parties' contract. As a result, we must rely on common sense and scarce precedent to illuminate this critical term.
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> . . .

[17] The most detailed type of award includes findings of fact and conclusions of law, but that type of award is rarely issued.

> Logically, the varying forms of awards may be considered along a "spectrum of increasingly reasoned awards," with a "standard award" requiring the least explanation and "findings of fact and conclusions of law" requiring the most. . . . In this light, therefore, a "reasoned award is something short of findings of fact and conclusions of law but more than a simple result." . . .
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> Webster's defines "reasoned" as "based on or marked by reasoning," and "provided with or marked by the detailed listing or mention of reasons." Webster's Third New Int'l Dictionary: Unabridged 1892 (1993). Relatedly, "reason"—as used in this context—is defined as an "expression or statement offered as an explanation of a belief or assertion or as a justification of an act or procedure." . . . Strictly speaking, then, a "reasoned" award is an award that is provided with or marked by the detailed listing or mention of expressions or statements offered as justification of an act—the "act" here being, of course, the decision of the Panel.[18]

c. While reasoned awards are issued for various reasons, the primary reason appears to be that the parties want to understand the basis for the award.[19] In my experience the cost of a reasoned award is usually considerably higher than the cost of a standard award, and the decision to require a reasoned award should not be made lightly, particularly when the amount in dispute is not significant.

d. Limitations on an award can be included in the arbitration clause. The following variations, which are typically used with monetary damage claims, limit the discretion of the arbitrator, prevent the dreaded "compromise" award, and in many cases are less expensive.

1. "High-low" arbitration is where the parties agree to a range for the award but do not share the range with the arbitrator, with an award over the high amount being reduced to that amount, and an award under the low amount being

[18] *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836,843-44 (11th Cir. 2011)(citations omitted and emphasis in the original).

[19] "[O]ur Layered Clause helps to alleviate the parties' concern about the basis of the award by requiring a reasoned award. While one may not be happy with the result, comfort may be found in knowing that it was not distilled from some mystical concoction." Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 161, 177 (May 2005).

increased to that amount. An award within the range is not adjusted. A variation of this is where the parties agree that the award will be no less than a specified amount and no more than a specified amount, and the arbitrator is directed to render an award between those two amounts.

2. "Baseball" arbitration is a type of arbitration where each party to the arbitration submits a proposed monetary award to the arbitrator and the other party, and after there has been a presentation of evidence, the arbitrator will choose one award from the two submitted awards without modification.

A. Because baseball arbitration limits an arbitrator's discretion (*i.e.*, the arbitrator selects either A or B, and nothing else), it should reduce the time the arbitrator spends arriving at a decision, which in turn will reduce the cost to the parties.

B. A key element of baseball arbitration is the incentive for each party to submit a highly reasonable number, since this increases the likelihood that the arbitrator will select that number.

C. This type of arbitration has been used in Major League Baseball salary disputes for many years, and it has been increasingly used in commercial disputes in recent years, primarily where the parties' dispute involves only a monetary amount.

D. I am aware of an arbitration that involved multiple claims for patent infringement, over $1 billion in alleged damages, and a hearing that lasted several weeks. Following the conclusion of the hearing each claim was submitted to the arbitrator individually, with each party submitting a proposed monetary award for each claim, and with the arbitrator selecting one of the two proposed awards for each claim. It is

my understanding from the arbitrator that this process worked well and resulted in the cost of the arbitration being significantly less than if he had been required to write a reasoned award. (Good for the parties, not so good for the arbitrator.)

3. "Night baseball" arbitration is a variation where the arbitrator is not informed of each party's proposal, and issues an award, which is then adjusted to conform to the closest of the parties' proposals.

e. Arbitral Rules generally provide for when awards are to be issued. For example, the AAA Commercial Rules and JAMS Rules both basically provide that the award will be issued within 30 days after the closing of the hearing, unless otherwise agreed by the parties or specified by law, while the Henning Rules provide that the award should, in most circumstances, be issued within one month after the conclusion of the hearing.

f. In an *ad hoc* arbitration, the Georgia Code provides that the arbitrator must issue the award within the time fixed in the arbitration agreement, or if not so fixed, within 30 days following the close of the hearing, but the parties can change this period by agreement. The FAA does not specify when an award must be issued.

ix. **Entry of judgment**. Under both the Georgia Code and the FAA, a party can have the award confirmed and made a judgment of the court. While an arbitrator's award is binding on the parties and does not require affirmation from a court to take effect, when a party refuses to abide by the award, confirmation and entry of judgment are essential for enforcement.

a. In domestic arbitrations, particularly under the FAA, the arbitration clause must contain an "entry of judgment" provision similar to the following: "*Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.*"

B. ***Optional Provisions***. In addition to the fundamental provisions, some additional provisions that should be considered are discussed below.

i. **Costs and fees**. Generally, unless the parties otherwise agree, the arbitrator may award the payment of the costs, fees and expenses associated with the arbitration (*e.g.*, the arbitrator's compensation and the arbitral institution's administrative fee) against one of the parties or allocate the costs between the parties.

ii. **Attorneys' fees**. Under both the Georgia Code and the FAA, an arbitrator has the power to award attorneys' fees if the parties expressly agree in the arbitration clause. Some arbitration clauses provide that each party will bear its own attorneys' fees (the "**American Rule**"), and some provide that the "prevailing party" will recover its attorneys' fees from the losing party. (In some cases the determination of who is the "prevailing party" can be a challenge.)

a. In domestic arbitrations arbitrators are sometimes reluctant to award attorneys' fees because under the American Rule courts may not award attorneys' fees absent statutory or contract authority.

b. Most Arbitral Rules allow for the allocation of attorneys' fees if such allocation is provided in the arbitration clause or allowed by applicable law.

iii. **Interest**. Under both the Georgia Code and the FAA, an arbitrator has the power to award interest unless the parties provide otherwise in their arbitration clause.

a. Most Arbitral Rules also provide that an arbitrator has the power to award pre- and post-judgment interest unless the parties provide otherwise in their arbitration clause, and such interest can be allocated by the arbitrator if such allocation is provided in the arbitration clause or allowed by applicable law.

b. There are three issues that arise in regard to an award of interest: (1) whether interest may be awarded, (2) the date from which interest accrues, and (3) the rate of interest to be used.

c. The better practice is that if the parties want an award to bear interest, it should be expressly authorized in the arbitration clause.

iv. **Punitive damages**. The general rule is that an arbitrator can award punitive damages unless the parties expressly and unambiguously preclude such awards in their arbitration clause. Under the FAA, an arbitrator can award punitive damages unless the arbitration clause expressly limits that power; however, there is no such restriction under the Georgia Code.[20]

a. Thus, if the parties wish to prohibit the arbitrator from awarding punitive damages, specific language to that effect should be included in the arbitration clause.

b. The parties also may want to include specific language in the arbitration clause that prohibits the arbitrator from awarding consequential and incidental damages.

v. **Expedited procedures**. In an expedited arbitration, the parties adopt procedures that significantly shorten the time from demand to award.

a. The AAA Commercial Rules include *Expedited Procedures*[21] that apply in any case in which no disclosed claim or counterclaim exceeds $75,000 (exclusive of interest, attorneys' fees, and arbitration fees and costs), unless the parties or the AAA determine otherwise.

b. *JAMS Streamlined Arbitration Rules and Procedures* (the "**JAMS Streamlined Rules**") (http://www.jamsadr.com/rules-streamlined-arbitration/) are separate from the JAMS Rules, and apply to arbitrations that are administered by JAMS in which the parties have agreed to use the JAMS Streamlined Rules, or in the absence of such agreement, no disputed claim or counterclaim exceeds $250,000 (exclusive of interest and attorneys' fees), unless other rules are prescribed.

1. In October 2010 JAMS amended the JAMS Rules to add Rules 16.1 and 16.2, which provide expedited procedures that include limits on depositions, document requests and e-discovery, which expedited procedures can

[20] YARN & JONES, *supra* note 4, § 9:55, at 285.

[21] See Rules E-1 to E-10.

be incorporated by reference in the parties' arbitration clause or later agreed to by the parties.

c. CPR has adopted *Fast Track Mediation and Arbitration Rules of Procedure* for *ad hoc* arbitrations and mediations (http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/609/Fast-Track-Mediation-and-Arbitration-Rules-of-Procedure.aspx).

vi. **Appellate review**. Technically, a party cannot appeal an arbitrator's award, but instead can apply to a trial court for an order to modify, vacate or confirm the award. A party can then appeal from a trial court's decision on such application.

a. The finality of arbitration awards is a significant benefit of arbitration; however, a significant drawback is the other side of the coin—lack of meaningful court review of arbitration awards. As discussed above, an arbitration award can be vacated only on very limited grounds, and errors of law, errors of fact, and errors of judgment are not grounds for reversal.

1. While the parties cannot expand the scope of review by the courts in their arbitration clause, it is possible to agree to broad appellate review by another arbitration panel.

b. In 2000 CPR adopted the *CPR Arbitration Appeal Procedure* (http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/604/CPR-Arbitration-Appeal-Procedure-and-Commentary.aspx), which can be used whether or not the original arbitration was conducted under the CPR Rules; in 2003 JAMS established the *JAMS Optional Arbitration Appeal Procedure* (http://www.jamsadr.com/appeal/); and in November 2013 the AAA adopted its *Optional Appellate Arbitration Rules* (http://go.adr.org/AppellateRules), all of which permit an appeal based on law and/or fact (similar to judicial appeals) to a panel of appellate arbitrators. In the case of CPR the

appellate panel will consist of former federal judges, and in the case of the AAA, the appellate panel will consist of former federal or state judges, or "neutrals with strong appellate backgrounds."

c. None of these arbitral institutions set monetary thresholds concerning what can be appealed; however, if the parties decide to adopt one of the appellate procedures, they may want to consider including a monetary threshold in the arbitration clause to discourage frivolous appeals.

vii. **Confidentiality**. Confidentiality is often assumed to be one of the primary advantages of arbitration; however, while arbitration proceedings are in fact private, they are not necessarily confidential (*e.g.*, an arbitration award enters into the public domain when an enforcement proceeding is commenced). In fact, most states' laws impose no confidentiality requirements upon the parties to the arbitration, although most Arbitral Rules provide that the arbitrators and the arbitral institution have an obligation to keep arbitration proceedings confidential, and some extend this to the parties.

a. Thus, if the parties intend for the arbitration proceedings, documents and award to be confidential, this should be included in the arbitration clause.

viii. **Time limits**. Whether due to business considerations or the desire to save costs, the parties may want to provide for time limitations in the arbitration clause. Generally, these type provisions require that the arbitration conclude within a certain number of days following the filing of the demand for arbitration or the appointment of the arbitrator, or require that the award be issued within a certain number of days following the closing of the hearing.

a. When time limits are used they should not be unreasonably short, and the arbitration clause should make the time limits subject to adjustment at the discretion of the arbitrator, to avoid putting the award at risk if the time limits are not met.

ix. **Step clauses**. Step clauses call for the parties to take certain preliminary steps, such as negotiation and mediation, before they can initiate arbitration proceedings. This gives the parties an opportunity to develop creative, business oriented solutions in a less adversarial setting before investing the time and money in an arbitration.

a. Mandatory negotiation followed by arbitration. This type provision typically requires a meeting among the business people first to attempt to negotiate a resolution of the dispute, and only if that effort is unsuccessful will a party be able to initiate an arbitration proceeding.

b. Mandatory negotiation followed by mediation and arbitration. This typically requires the same type of meeting among the business people, followed by mediation, and only if both efforts are unsuccessful will a party be able to initiate an arbitration proceeding.

1. Requiring mediation in the arbitration clause avoids the stigma of "weakness" that the uninformed often attach to the first party who suggests mediation.

2. As of October 1, 2013, the AAA Commercial Rules mandate (rather than merely permit) mediation of all disputes involving claims exceeding $75,000; however, any party to the arbitration may unilaterally opt out of the mediation.

c. I have found step clauses to be particularly useful in business disputes. Good business executives try to make rational risk-reward decisions based on the assessment of probabilities; in contrast, a judge or jury often rules totally in favor of one side or the other, even when the probabilities are more closely balanced. Thus, it is often "too great a risk for a company to entrust its fate to the inscrutability of a judge or to the vagaries of a jury or the uncertainty of an arbitrator. For business people, litigation is not

a logical way to resolve a dispute."[22] A step clause forces logic on the parties by requiring them to work together to try to resolve the dispute on a mutually agreeable (or some would say mutually "disagreeable") basis before turning loose the litigators.

1. Mr. Freund was discussing mediation as an alternative to litigation and arbitration; however, due in large part to the parties' ability to select one or more arbitrators with relevant business experience, in many business disputes arbitration will be preferable to litigation when the dispute cannot be resolved through negotiation or mediation.

d. If step clauses are not carefully drafted they can be used as a vehicle for delay and can result in required but meaningless negotiations where one or more of the parties has no real interest in moving toward a settlement. Also, it should be made clear that each preliminary step is intended as a condition to be satisfied before the arbitration process can be commenced, and not a mere suggestion; failure to make this clear could lead to litigation.

1. These risks can be mitigated by providing strict time limits for completing each step so there is no confusion as to when the next step can be taken.

e. Other issues to consider are whether to include provisions to (1) toll the statute of limitations during the course of the preliminary processes, and (2) preserve a party's ability to seek interim relief from a court under certain conditions before that party has complied with the required steps.

x. **Discovery**. It is generally accepted that discovery is the primary driver of expense and delay in arbitration, and as arbitration has become more like litigation, the use of discovery in commercial disputes has increased. Under the FAA, discovery is not available in arbitration except

[22] James C. Freund, *Calling All Deal Lawyers—Try Your Hand at Resolving Disputes*, 62 BUS. LAW. 37, 40 (Nov. 2006).

to the extent agreed upon by the parties, although the arbitrator has limited subpoena power. Under the Georgia Code, the parties have a right to obtain witness lists and examine documents that are relevant to the arbitration, and the arbitrator has discretion to establish procedures for some limited discovery. The arbitrator is also empowered to issue subpoenas for attendance at a hearing, but the arbitrator has little power to actually compel discovery.

a. Most, if not all, Arbitral Rules provide for some sort of limited discovery, and they empower the arbitrator to manage the discovery process, which may include the power to sanction and clearly includes the right to draw adverse inferences.

b. When the AAA Commercial Rules were amended in October 2013 they expanded the prior rule's authorization of discovery, directing the arbitrator to oversee discovery "with a view to achieving an efficient and economical resolution of the dispute." They also authorize the arbitrator to require the parties to exchange documents on which they intend to rely, and advise the parties to set "reasonable search parameters" prior to exchange of electronic documents.

c. In order to save hearing time, the parties may want to specifically allow for depositions in the arbitration clause, but with a limit on the number and duration of the depositions.

d. The parties should also consider eliminating or severely limiting interrogatories and requests for admission, both of which can be expensive and often fail to produce meaningful information.

xi. **Dispositive motions**. In the absence of express limitations in the arbitration clause, arguably the arbitrator has the power to grant dispositive motions. In arbitration, dispositive motions can cause significant delay and unreasonably prolong the discovery period. Moreover, they are typically based on lengthy and expensive briefs, and dispositive motions involving issues

of fact are generally denied, in part because one of the grounds for vacatur under the FAA is the arbitrator's refusal to hear relevant evidence.

a. However, dispositive motions can on occasion improve the efficiency of the arbitration process if directed to discrete legal issues, such as defenses based on statute of limitations or clear contractual provisions, in which case an appropriately framed dispositive motion can eliminate the need for expensive and time consuming discovery.

b. Rule R-33 was added to the AAA Commercial Rules as of October 1, 2013, and it expressly permits the filing of a dispositive motion, but "only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."

c. Dispositive motions can be effectively addressed in the arbitration clause as follows:[23]

In any arbitration arising out of or related to this Agreement:

1. Any party wishing to make a dispositive motion shall first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side shall have a brief period within which to respond.

2. Based on the letters, the arbitrator will decide whether to proceed with more comprehensive briefing and argument on the proposed motion.

3. If the arbitrator decides to go forward with the motion, he/she will place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

4. Under ordinary circumstances, the pendency of such a motion will not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

V. INTERNATIONAL ARBITRATION. The Atlanta International Arbitration Society, Inc. ("**AtlAS**") (www.arbitrateatlanta.org) was formed "[t]o serve the global business community in providing world-class

[23] See page 8 of the JAMS Clause Workbook.

quality and efficient service, in a highly cost-competitive and value-driven environment by . . . [among other things], promoting the use of international arbitration and the selection of Atlanta as the ***situs*** for international arbitration proceedings . . . ." One of the AtlAS initiatives is to get more corporations to name Atlanta as the seat of the arbitration and/or the physical location of the arbitration hearings, in the arbitration clauses of their international contracts. The AtlAS website includes a link to a number of model arbitration clauses from various arbitral institutions that can be used to provide for arbitration in Atlanta, as well as two sample clauses providing for ad hoc arbitration in Atlanta (http://arbitrateatlanta.org/sample-arbitration-clauses/).