Georgia State University Law Review

Volume 21
Issue 2 *Winter 2004*

Article 3

12-1-2004

The Addition of the "Manifest Disregard of the Law" Defense to Georgia's Arbitration Code and Potential Conflicts with Federal Law

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THE ADDITION OF THE "MANIFEST DISREGARD OF THE LAW" DEFENSE TO GEORGIA'S ARBITRATION CODE AND POTENTIAL CONFLICTS WITH FEDERAL LAW

INTRODUCTION

In recent years, parties have increasingly resorted to arbitration to settle commercial disputes.[1] The importance of arbitration has continued to grow as parties have utilized this alternative method of dispute resolution to settle their differences.[2] As the frequency of arbitration's use increases, courts must resolve questions crucial to the smooth functioning of the entire arbitration system.[3] This Note analyzes the role and nature of the codified defense of "manifest disregard of the law" within the context of commercial arbitration in the State of Georgia. It argues that federal law preempts the manifest disregard of the law provision in the Georgia Arbitration Code.[4] Additionally, this Note argues that practical implementation of the standard will be too unwieldy and will yield a result contrary to the interests of arbitration. Finally, it argues that characterizing the defense as a procedural rule so as to escape the reach of federal law leads to a counter-intuitive result.

Part I of this Note will give a brief overview of the form and function of commercial arbitration in the United States. Part II contains an analysis of both the case law and statutes on arbitration in Georgia. Part III analyzes the manifest disregard of the law standard in federal courts. This discussion begins with the origin of the manifest disregard of the law defense, followed by a model that will be useful in understanding the standard. Part IV will consider the potential problems for the standard in Georgia, particularly whether federal law has preempted the Georgia Arbitration Code and, if it has

1. *See* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 734 (1996) [hereinafter *Law in Disarray*].

2. *See* ROBERT COULSON, BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW 7 (4th ed. 1991).

3. *See Law in Disarray*, *supra* note 1, at 734.

4. *See* O.C.G.A. §§ 9-9-1 to -18 (Supp. 2004).

not, whether the standard can escape the reach of federal law and still remain useful for its intended purpose.

I. ARBITRATION DEFINED

Commercial arbitration is one of the primary means of alternative dispute resolution in the business arena.[5] Arbitration occurs when two parties submit their dispute to an impartial third party decision maker for a binding, out-of-court resolution that local courts may enforce.[6] An arbitration proceeding often does not involve an elected or appointed judge.[7] Little involvement with formal judicial procedures is an important aspect in commercial arbitration since court dockets are extremely full and litigation takes ever-increasing periods of time.[8] Parties value arbitration as a means to resolve disputes because it can be quick, cheap, confidential, and binding, all of which are important qualities in the business world.[9] In contrast to judges, commercial arbitrators often possess a background similar to the parties whose dispute is at issue.[10] Thus, arbitration can lead to a more appropriate result, and both parties are more likely to follow it.[11]

Commercial arbitration often begins with a clause in a contract signed by two parties. The parties agree prior to a dispute to have an independent third party conclusively resolve some or all issues of law and fact arising out of a dispute over their contract.[12] However, the end result of arbitration can result in an inaccurate interpretation of

5. *See* COULSON, *supra* note 2, at 8-9.
6. *Id.* at 8.
7. *See id.* at 7-8.
8. *See id.* at 7.
9. *Id.* at 10.
10. *Id.* at 9.
11. *See* COULSON, *supra* note 2, at 9.
12. *See* Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 183 (7th Cir. 1985) ("Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. . . . If the award is within the submission, . . . a court of equity will not set it aside for error either in law or fact." (quoting Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1855))); COULSON *supra* note 2, at 8 ("Arbitration is the submission of a disagreement to one or more impartial persons. Usually, the parties agree to abide by the arbitrator's decision."); *see also Law in Disarray*, *supra* note 1, at 740 & nn.20-23.

the law.[13] Yet, parties agree to accept these uncertainties and imprecise interpretations.[14] In exchange, they receive the "simplicity, informality, and expedition" that an arbitral tribunal has but that a court of law might lack.[15]

Commercial arbitrations appeal to savvy businessmen or corporations who are seeking a quick way to resolve disputes and maintain business relationships.[16] Contracts between these parties are usually negotiated at arms length; the relatively equal bargaining power and skills of both sides ensure that both parties consent to and freely negotiate the many contract provisions, which often contain arbitration clauses.[17]

Parties to a commercial arbitration should expect results consistent with their bargain.[18] The losing party cannot take an appeal simply

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13. *See* Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., 22 F.3d 1010, 1011 (10th Cir. 1994) ("Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system . . . . One choosing arbitration should not expect the full panoply of procedural and substantive protection offered by a court of law."); Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972) ("The sacrifice that arbitration entails in terms of legal precision is recognized and is implicitly accepted in the initial assumption that certain disputes are arbitrable." (citations omitted)); *see also Law in Disarray*, *supra* note 1, at 740 & nn.20-23.

14. Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1990) ("When the parties agreed to submit to arbitration, they also agreed to accept whatever reasonable uncertainties might arise from the process."); *see also Law in Disarray*, *supra* note 1, at 740 & nn.20-23.

15. *See Bowles Fin. Group, Inc.*, 22 F.3d at 1011 ("[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29-33 (1991)) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))); *see also Law in Disarray*, *supra* note 1, at 741 & n.25.

16. *See* THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 2-3 (3d ed. 2002). It is these business arbitrations which this Note primarily focuses on.

17. *Id.* at 14-15.

18. *Bowles Fin. Group, Inc.*, 22 F.3d at 1011 ("Those who choose to resolve a dispute by arbitration can expect no more than they have agreed."); Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160, 164-65 (D.C. Cir. 1981). The court in *Davis* stated:

> Where parties have selected arbitration as a means of dispute resolution, they presumably have done so in recognition of the speed and inexpensiveness of the arbitral process; federal courts ill serve these aims and that of the facilitation of commercial intercourse by engaging in any more rigorous review than is necessary to ensure compliance with statutory standards.

Davis, 667 F.2d at 164-65; *see also* Stroh Container Co. v. Delphi Indus., 783 F.2d 743, 751 (8th Cir. 1986) (finding that sophisticated parties "can be presumed to have been well versed in the consequences of their decision to resolve their disputes in this manner"); *Law in Disarray*, *supra* note 1, at 741 & nn.24-26.

because of his dissatisfaction with the arbitral result.[19] Parties cannot seek "vacation" (non-enforcement) of the award simply because they are unhappy with the result.[20]

Often the rules for commercial arbitrations do not require arbitrators to set out the reasons or key facts for their decisions in the written award.[21] In the United States, commercial arbitration awards do not identify the facts, contract provisions, and relevant law central to the resolution of the dispute, and they do not demonstrate how the arbitrator applied the law to the facts to resolve the dispute.[22] The award usually contains only the name of the winning party and the amount of the award.[23] Without written awards that detail how the arbitrator arrived at his decision, there is a presumption that the neutral third party arbitrator made this decision in a legitimate way.[24]

The Federal Arbitration Act[25] ("FAA") is the body of legislation that governs commercial arbitration in the United States.[26] The public policy behind the FAA presumes that the arbitrator arrived at his

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19. *See* Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994). The court in *Remmey* stated:

> The statutory grounds for vacatur . . . do not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators reached. . . . [P]arties may not seek a "second bite at the apple" simply because they desire a different outcome. "To permit such attempts would transform a binding process into a purely advisory one."

Id. (quoting Richmond, Fredericksburg & Potomac R.R. v. Transp. Communications Int'l Union, 973 F.2d 276, 281 (4th Cir. 1992)).

20. Dean Witter Reynolds, Inc. v. Deislinger, 711 S.W.2d 771, 772 (Ark. 1986) ("Simply being dissatisfied with the results is not a good reason for setting aside the award."); *see also Law in Disarray*, *supra* note 1, at 741 & nn.25-26, 742.

21. *See Law in Disarray*, *supra* note 1, at 734-35.

22. *See id.* at 734, 735 & n.5 ("The 'no reasoned award' norm of American commercial arbitration is contrary to the practice in most other industrialized nations.").

23. *See* COULSON, *supra* note 2, at 30.

24. *See* A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992) ("The rule that arbitrators need not state their reasons presumes the arbitrators took a permissible route to the award where one exists."); French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 907-08 (9th Cir. 1986) (finding that the arbitrator could have arrived at his award within the scope of the law and therefore giving him the benefit of the doubt); Stroh Container Co. v. Delphi Indus., 783 F.2d 743, 750 (8th Cir. 1986) (finding that the "absence of express reasoning by the arbitrators" does not merit overturning the award and that to do so whenever an award was not explained would "subvert . . . the arbitral process"); *Law in Disarray*, *supra* note 1, at 735.

25. 9 U.S.C. §§ 1-307 (2000).

26. *See generally id.*

result legitimately.[27] Section 10(a) of the FAA—the relevant section on vacatur, or non-enforcement of arbitral awards—sets out the relevant grounds for defending against the enforcement of arbitral awards:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
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> Where the award was procured by corruption, fraud, or undue means.
>
> Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> 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.
>
> 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.[28]

The public policy behind the FAA is the idea of holding the parties to their agreement by enforcing their agreement to arbitrate.[29] In

27. *See id.*; Davis v. Prudential Sec., 59 F.3d 1186, 1190 (11th Cir. 1995) ("The FAA presumes that arbitration awards will be confirmed and enumerates only four narrow bases for vacatur."); Wall Street Assocs. v. Becker Paribas Inc., 27 F.3d 845, 849 (2d Cir. 1994) (holding that courts presume that awards are valid until proven otherwise by one of the four statutory grounds listed in 9 U.S.C. § 10 because of the "FAA's strong presumption in favor of enforcing arbitration awards"); Robbins v. Day, 954 F.2d 679, 682 (11th Cir. 1992) ("[T]he Federal Arbitration Act presumes that reviewing courts will confirm arbitration awards and the courts' review of the arbitration process will be severely limited."), *disapproved of by* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); *see also Law in Disarray*, *supra* note 1, at 735 & nn.5-8.

28. 9 U.S.C. § 10 (2000).

addition, the FAA makes it hard to vacate arbitral awards simply because one party is dissatisfied with the award.[30] The business community envisions the arbitral forum as the first and last stop on the road to enforcement, not as a makeshift trial court with many levels of review.[31] In recent years, however, federal courts have become increasingly willing to vacate arbitral awards for grounds other than the four enumerated above.[32] One of those grounds is the manifest disregard of the law standard, which the federal judiciary created and the Georgia Legislature added to the Georgia Arbitration Code in 2003.[33]

II. ARBITRATION AND "MANIFEST DISREGARD OF THE LAW" IN GEORGIA

Until recently, the Georgia Arbitration Code's section on vacatur did not differ significantly from its federal counterpart.[34] However, in

29. *See id.* §§ 2, 4 (2000); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 271 (1995) (holding that Congress "intended courts to 'enforce [arbitration] agreements into which parties had entered' . . . and to 'place such agreements "upon the same footing as other contracts"'") (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974))); *see also Law in Disarray*, *supra* note 1, at 741 & nn.24-26.

30. *See Robbins*, 954 F.2d at 682 (holding that courts should refrain from intervention and review of arbitral awards so that the efficiency and integrity of the process will remain whole), *disapproved of by First Options of Chicago, Inc.*, 514 U.S. 938; *Law in Disarray*, *supra* note 1, at 742 & n.29.

31. *See* Eljer Mfg. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) (finding that arbitration does not have a series of "junior varsity trial courts" providing rigorous review to the losing party and that this is necessary to preserve the benefits of reduced delay and expense and to prevent arbitration from becoming a "preliminary step to judicial resolution") (quoting Nat'l Wrecking Co. v Int'l Bd. of Teamsters, Local 731, 990 F.2d 957, 960 (7th Cir. 1988) and E.I. DuPont de Nemours v. Grasselli Employees Indep. Ass'n, 790 F.2d 611, 614 (7th Cir. 1986)); *see also Law in Disarray*, *supra* note 1, at 741-43.

32. *See Law in Disarray*, *supra* note 1, at 735-36.

33. Manifest disregard of the law does not appear in 9 U.S.C. § 10. *See supra* text accompanying note 28. This Note will explore this judicially created standard for vacatur. *See infra* Parts III.A-B, IV.A. The standard consists of two elements: (1) a subjective appreciation of the applicable law and (2) a knowing or willful disregard of that law. *See infra* Part III.A-B.

34. *Compare* O.C.G.A. § 9-9-13(b) (2000), *with* 9 U.S.C. § 10 (2000). O.C.G.A. § 9-9-13(b) provides in pertinent part:

> (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;

the 2003 legislative session, Representative Mary Margaret Oliver of the Georgia House of Representatives introduced a bill that would add another defense to the Georgia Arbitration Code's section on vacatur.[35] This defense was the manifest disregard of the law standard.[36] The introduction and eventual adoption of this additional defense ran counter to previous Georgia case law on the subject.[37] In her remarks on the floor of the Georgia House of Representatives in support of her bill, Representative Oliver made it clear that she intended the addition of the provision to be a consumer protection measure.[38] As a result, the legislature adopted the manifest disregard

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(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; or

(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; . . .

(d) The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

O.C.G.A. § 9-9-13 (2000). O.C.G.A. § 9-9-13(b) now contains "(5) The arbitrator's manifest disregard of the law." O.C.G.A. § 9-9-13(b) (Supp. 2004).

35. Representative Oliver said the following on the floor immediately prior to the bill's passage:

> I think over half our Georgian citizens [sic] right now have submitted to arbitration, knowingly or unknowingly, . . . 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 benefiting from this opportunity to avoid traditional litigation. However, even though the [Georgia] Arbitration Statute gives very specific *limited* reasons for the overturn of an arbitrator's order, recently the court here in Georgia decided that it was not authorized to overturn an arbitrator's decision even when it was a manifest disregard of the law. In other words, the arbitrator knew what the law was [and] chose to disregard the law. I believe that that's wrong. . . . House Bill 91 will allow the court to overturn the decision of an arbitrator when it is a manifest disregard of the law. This again is a very narrow opportunity for the court to intercede. It is an opportunity only when the judge-arbitrator knows what the law is [and] chooses to disregard the law.

Audio Recording of House Proceedings, Feb. 12, 2003, *at* http://www.georgia.gov/00/channel/0,2141,4802_6108105,00.html (remarks by Rep. Mary Margaret Oliver).

36. The only change to the arbitration code proposed by HB 91 and eventually adopted by HB 792 was the addition of a fifth defense—"[t]he arbitrator's manifest disregard of the law." O.C.G.A. § 9-9-13(b)(5) (Supp. 2004); H.B. 792, 147th Gen. Assem., Reg. Sess. (Ga. 2003), H.B. 91, 147th Gen. Assem., Reg. Sess. (Ga. 2003).

37. *See, e.g.*, Progressive Data Sys., Inc. v. Jefferson Randolph Corp., 568 S.E.2d 474 (Ga. 2002).

38. Representative Oliver's remarks revealed her belief that arbitration is a trap for the unwary consumer. *See supra* note 35. However, O.C.G.A. § 9-9-2 already provided:

> (c) This part [of 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 disputes can be enforced, except the following, to which this part shall not apply:

of the law standard via House Bill 792 to protect the consumer public in Georgia and to prevent the enforcement of *any* arbitral award contrary to the new defense that a proponent seeks to enforce in the State of Georgia, not just consumer arbitral awards.[39]

A. The State of the Common Law Prior to the Passage of HB 792

The concept of manifest disregard of the law was not new to the judiciary of the State of Georgia.[40] The most authoritative and recent pronouncement of the law on this subject prior to the amendment of O.C.G.A. § 9-9-13(b) was *Progressive Data Systems, Inc. v. Jefferson Randolph Corp.*[41] This case involved a computer equipment and software vendor, Progressive Data Systems ("PDS"), and an unsatisfied customer, Jefferson Randolph Corp. ("JRC").[42] JRC sued PDS for fraud and rescission of a sales agreement after delivery of the purchased equipment.[43] In return, PDS sought arbitration and counterclaimed for unpaid software licensing fees and future fees.[44] The arbitrator awarded PDS compensatory damages, and the trial court confirmed the award.[45] JRC appealed, and the Georgia Court of Appeals reversed, holding that the arbitrator manifestly disregarded the law because he awarded damages even though he recognized that

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(5) Any loan agreement or consumer financing agreement in which the amount of indebtedness is $25,000.00 or less at the time of execution;
(6) Any contract for the purchase of consumer goods . . . ;
(7) Any contract involving consumer acts or practices or involving consumer transactions . . . .

O.C.G.A. § 9-9-2 (2001). Thus, it would seem that the Georgia Arbitration Code provides protection for unwitting consumers. The only questions that remain concern the effect of the addition of manifest disregard of the law for all uses of arbitration in the State of Georgia that do not involve consumer transactions. For example, business disputes and commercial arbitration are two of the main benefactors of arbitration. *See* CARBONNEAU, *supra* note 16.

39. *See* H.B. 792, 147th Gen. Assem., Reg. Sess. (Ga. 2003). O.C.G.A. § 9-9-13(a) states simply that "[a]n application to vacate an award shall be made to the court" and puts no limitation on the kind of award, commercial, consumer or otherwise. O.C.G.A. § 9-9-13(a) (Supp. 2004). A court may potentially deny any award for manifest disregard of the law. *See infra* Part IV.A-C.

40. *See, e.g., Progressive Data Sys., Inc.*, 568 S.E.2d at 474.

41. 568 S.E.2d 474 (Ga. 2002).

42. *See id.* at 474.

43. *Id.*

44. *Id.*

45. *Id.*

he should treat damages for future license fees as liquidated damages and therefore as an unenforceable penalty.[46]

The Georgia Supreme Court held that the "four statutory grounds for vacating an arbitration award [were] exclusive."[47] A court may vacate an award only when one of the four statutory grounds is present because the "Georgia Arbitration Code is in derogation of the common law and must be strictly construed."[48] This interpretation suggests that non-statutory grounds are outright invalid.[49] Since manifest disregard of the law was not an enumerated defense, JRC could not use it as a defense to enforcement of the award.[50] In addition, manifest disregard of the law did not fit into the third statutory ground since overstepping the arbitrator's authority "only comes into play when an arbitrator determines matters beyond the scope of the case."[51] Thus, "[i]t is not applicable where, as here, the issue to be decided, i.e., damages, is properly before the arbitrator."[52]

The majority made note of the fact that the FAA's grounds for vacatur are similar to the Georgia grounds and that many federal courts cited manifest disregard of the law as a proper grounds for vacatur.[53] The court noted that manifest disregard of the law was "nothing more than a non-statutory creation of the federal courts."[54] The Georgia Supreme Court found it significant that manifest disregard of the law was not among the enumerated grounds, finding that, "[w]hatever 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."[55]

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46. *Id.*
47. *Progressive Data Sys., Inc.*, 568 S.E.2d at 475.
48. *Id.*
49. *See id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Progressive Data Sys., Inc.*, 568 S.E.2d at 475.
54. *Id.*
55. *Id.*

Justice Carley, writing for the dissent, noted that, while manifest disregard of the law was not on the list of enumerated defenses, "a statute is to be read as a whole, and the spirit and intent of the legislation prevails over a literal reading of the language."[56] He further observed that the standard for manifest disregard of the law as it appeared in federal courts was "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle."[57] The dissent noted that manifest disregard of the law is not simply a review of the evidence that an arbitrator used.[58] Justice Carley also attempted to equate manifest disregard of the law with the enumerated defenses of overstepping authority and partiality of arbitrators.[59] He observed that, "in the very rare instance where an arbitrator intentionally ignores a controlling legal principle, he or she lacks the requisite impartiality . . . [and that] an arbitrator who intentionally elects not to be bound by controlling legal principles must necessarily overstep his or her legitimate authority."[60] The dissent expressed the traditional hostility of courts towards arbitration.[61] The dissent also tried to qualify the manifest disregard of the law defense by noting that it entailed more than just a misunderstanding or misinterpretation of the law.[62] Finally, the dissent noted that the majority's failure to recognize manifest disregard of the law as a reason for vacatur might discourage the use of arbitration when parties to a potential suit know that an arbitrator could disregard the law.[63]

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56. *Id.* at 476 (citations omitted). It would seem that Justice Carley failed to heed his own advice to read the statute as a whole because O.C.G.A. § 9-9-13(d) states, "The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." O.C.G.A. § 9-9-13(d) (Supp. 2004). An arbitrator has great powers to fashion an award. *See infra* note 68 and accompanying text.

57. *Progressive Data Sys., Inc.*, 568 S.E.2d at 476 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995)).

58. *Id.* at 477.

59. *See id.* at 476; *see also supra* note 33.

60. *Progressive Data Sys., Inc.*, 568 S.E.2d at 476.

61. *Id.* ("A holding that the courts cannot vacate an arbitration award on the basis of the arbitrator's 'manifest disregard of the law' has the effect of rendering judicial review a meaningless exercise."); *see also* Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

62. *Progressive Data Sys., Inc.*, 568 S.E.2d at 477 (citing O.R. Sec. v. Prof'l Planning Ass'n, 857 F.2d 742, 747 (11th Cir. 1988)).

63. *Id.* at 478.

B. Greene v. Hundley[64]

The court in *Progressive Data Systems, Inc.* rested its opinion on *Greene v. Hundley*.[65] In *Greene*, Hundley was a homeowner that had a dispute with Greene, a builder, and as a result, the two parties submitted their dispute to binding arbitration.[66] The arbitrator awarded damages to both parties and made no findings of fact.[67] The superior court denied Hundley's appeal to vacate the award and instead confirmed the award because Hundley had not met any of the four statutory grounds for vacatur.[68] The Georgia Court of Appeals reversed, reasoning that the arbitration process was part of the judicial process and therefore subject to review.[69] Upon review, the court vacated the award because it found no evidence to support it.[70]

Writing for a unanimous Georgia Supreme Court, Justice Sears began her analysis by noting that the purpose of the Georgia Arbitration Code is to eliminate the common law rulings on arbitration; thus, the court found that the four enumerated grounds in the statute were exclusive.[71] Here, the court observed that the arbitrator had great powers to fashion a remedy and decided that 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.'"[72] Parties that agree to arbitrate do not receive all of the rights that they would have enjoyed in a court of law, but rather they agree to waive many of these rights in favor of a quick resolution of

64. 468 S.E.2d 350 (Ga. 1996).

65. *See Progressive Data Sys., Inc.*, 568 S.E.2d at 474-75.

66. *Greene*, 468 S.E.2d at 351.

67. *Id.*

68. *Id.*

69. *Id.* at 351-52.

70. *Id.* at 351, 352 & n.5. The Georgia Supreme Court noted that the court of appeals' determination that the evidence did not support the arbitrator's findings resulted from that court's adoption of the homeowner's statement of facts rather than its own investigation of the record. *Id.* Greene did not put forth his own statement of facts but instead argued that the court did not have the power to examine the sufficiency of the evidence of the award. *Greene*, 468 S.E.2d at 351, 352 & n.5.

71. *Id.* at 352. This is significant because Justices Hunstein and Carley, the two dissenting justices in *Progressive Data Sys., Inc.*, agreed with the court's holding in *Greene* where the court narrowly construed the statutory bases for vacation and therefore left no room for non-statutory bases like manifest disregard of the law. *See id.* at 384.

72. *Id.* at 352 (quoting Goodrich v. Southland Homes Corp., 449 S.E.2d 154 (Ga. Ct. App. 1994)).

their dispute.[73] The court held that an arbitrator could fashion any remedy as long as he did not overstep his authority and as long as the award drew its "essence from the contract or statute."[74] Since both parties agreed to arbitrate all disputes, the arbitrator did not overstep his authority and did not violate any of the other statutory grounds.[75]

The Georgia Supreme Court held that a reviewing court cannot assess the evidence, regardless of whether the reviewing court believes there is insufficient or no evidence to support the award.[76] Allowing a court to make an independent determination of the sufficiency of the evidence would subvert the goals of efficiency and finality inherent in arbitration.[77]

Greene is significant because it laid the foundation for the strict construction of O.C.G.A. § 9-9-13 and for the denial of non-statutory grounds for vacatur elaborated in *Progressive Data Systems, Inc.*[78] Justices Hunstein and Carley were part of the decision in *Greene*.[79] The major distinguishing characteristic between *Greene* and *Progressive Data Systems, Inc.* is that the court of appeals in *Greene* overturned the arbitrator's award based on a lack of evidence to support the findings, whereas the arbitrator in *Progressive Data Systems, Inc.* created an award in violation of a statute prohibiting liquidated damages as a penalty.[80] Despite the broad policy in favor of arbitration and the Georgia statutory provision granting arbitrators extensive powers, Justice Carley in *Progressive Data Systems, Inc.* felt that the court should limit *Greene* to questions regarding sufficiency of evidence.[81]

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73. *Id.* Examples of these waived rights are certain constitutional and procedural rights such as a right to trial by jury. *Id.* at 352-53.

74. *Greene*, 468 S.E.2d at 353; *see supra* note 33.

75. *Id.* at 353-54.

76. *Id.*

77. *Id.* at 354.

78. *See* Progressive Data Sys., Inc. v. Jefferson Randolph Corp., 568 S.E.2d 474, 474 (Ga. 2002).

79. *See Greene*, 468 S.E.2d at 354; *supra* note 71.

80. *See Progressive Data Sys., Inc.*, 568 S.E.2d at 477; *Greene*, 468 S.E.2d at 351-52.

81. *See Progressive Data Sys., Inc.*, 568 S.E.2d at 477.

III. FEDERAL COURTS AND "MANIFEST DISREGARD OF THE LAW"

A. Origin

The manifest disregard of the law standard originated in the United States Supreme Court case of *Wilco v. Swan.*[82] *Wilco* involved a claim of fraud brought against a securities brokerage firm for damages pursuant to the Securities Act of 1933.[83] Respondent moved for a stay of trial pending the outcome of arbitration that the parties had agreed upon prior to entering into their contractual relationship to deal in securities.[84] The district court denied the stay, but the court of appeals reversed.[85] The Supreme Court's reasoning displayed its traditional hostility toward arbitration.[86] In dicta, the Court stated:

> While it may be true that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to *manifest disregard* are not

82. 346 U.S. 427 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989).

83. *Id.* at 428. Part of the Securities Act of 1933 provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (2000); *see also Wilco*, 346 U.S. at 430 n.6.

84. *Wilco*, 346 U.S. at 429.

85. *Id.* at 430.

86. *See id.* at 435-36. The court stated:

> This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," . . . cannot be examined.

Id. (citations omitted); *see also* Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

> subject, in the federal courts, to judicial review for error in interpretation.[87]

The Supreme Court held that parties could not arbitrate issues relating to securities law because of public policy concerns underlying the Securities Act of 1933 and because the underlying concern about the inarbitrability of securities law issues.[88]

For such a prominent non-statutory defense to vacatur of arbitral awards, the Supreme Court has mentioned manifest disregard of the law only three times and has never fully defined the term.[89] In *Shearson/American Express, Inc. v. McMahon*,[90] Justice Blackmun, in a partially concurring opinion, noted that "[j]udicial review is still substantially limited to the four grounds listed in § 10 of the Arbitration Act and to the concept of 'manifest disregard' of the law."[91] In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[92] Justice Stevens stated in his dissent that "[a]rbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207."[93] In *First Options of Chicago, Inc. v. Kaplan*,[94] the Court in a parenthetical mentioned *Wilco* and how a party must abide by an arbitrator's decision that is not in manifest disregard of the law.[95]

B. The Development of the Standard and a Model to Understand the Standard

As a result of the Supreme Court's failure to define manifest disregard of the law, the federal appellate courts have taken up the

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87. *Wilco*, 346 U.S. at 436-37 (emphasis added) (quoting Wilco v. Swan, 201 F.2d 439, 445 (2d Cir. 1953)).

88. *Id.* at 434-35.

89. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 259 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 656 (1985).

90. 482 U.S. 220 (1987).

91. *Id.* at 259.

92. 473 U.S. 614 (1985).

93. *Id.* at 656.

94. 514 U.S. 938 (1995).

95. *Id.* at 942.

role of fleshing out this standard.[96] At first glance, the resulting cases seem chaotic; however, at least one commentator has discerned a pattern among the decisions.[97]

There is a consensus among the appellate courts that manifest disregard of the law consists of two separate elements.[98] First, there is an "actus reus" element of the offense.[99] The arbitrator must make such a "blatant, gross [misapplication] of law [to the facts such] that it is apparent on the face of the award."[100] Second, an arbitrator must be aware of the law in the relevant area but nonetheless consciously or deliberately disregard the law where an ordinary, reasonable person could discern the applicable legal standard.[101] This is the "mens rea" element of the defense.[102]

Federal case law supports this interpretation of the manifest disregard of the law standard.[103] In *Westerbeke Corp. v. Daihatsu Motor Co.*,[104] the Second Circuit recognized its own two prong test.[105] An arbitrator must first be aware of the well-defined, explicit applicable law and then ignore it completely.[106]

Cases from other jurisdictions also recognize this two-step process.[107] In *Montes v. Shearson Lehman Brothers*,[108] the Eleventh Circuit determined that manifest disregard of the law occurred when an arbitrator was "conscious of the law and deliberately ignore[d]

96. *See* 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. RESOL. 117, 122 (1998) [hereinafter *Reining in Manifest Disregard*].

97. *See id.* at 124-25. Hayford's model is helpful to understand both the standard as the courts now perceive it and the trend in their thinking. *See id.*

98. *See id.* at 124.

99. *Id.* The ordering of the elements is not necessarily important. *Id.* at 125.

100. *Reining in Manifest Disregard*, *supra* note 96, at 124.

101. *Id.*

102. *Id.* at 125.

103. *See, e.g.*, Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 217 (2d Cir. 2002); Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1461 (11th Cir. 1997); Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990); *see also Reining in Manifest Disregard*, *supra* note 96, at 123-24.

104. 304 F.3d 200 (2d Cir. 2002).

105. *See id.* at 209.

106. *Id.* (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 934 (2d Cir. 1986)).

107. *See, e.g.*, *Montes*, 128 F.3d at 1456; *Advest, Inc.*, 914 F.2d at 6.

108. 128 F.3d 1456 (11th Cir. 1997).

it."[109] The First Circuit held in *Advest v. McCarthy*[110] that manifest disregard of the law entails a showing that the arbitrator "appreciated the existence of a governing legal rule but wilfully [sic] decided not to apply it."[111] Additionally, the Sixth Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*[112] held that an arbitrator "does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate[] and (2) the arbitrators refused to heed that legal principle."[113] Finally, the Seventh Circuit in *Eljer Manufacturing, Inc. v. Kowin Development Corp.*[114] held that manifest disregard occurs when "the arbitrator deliberately disregards what he knows to be the law" but that mere factual errors or incorrect interpretations of law are not enough.[115]

Despite this consensus, appellate courts have varied widely in their application of this two-step process; they have responded to these criteria in three general ways.[116] Courts have responded this way because of the commercial arbitration practice of not issuing reasoned awards, thus making it difficult or impossible to determine if an arbitrator affirmatively knew the applicable law and nevertheless purposely disregarded it.[117] These categories do not represent three distinct groupings of treatment of the manifest disregard of the law standard ("the standard") but rather a continuum of deference that the courts give to the non-reasoned awards handed down by arbitrators.[118]

1. The "Futility-Acknowledged" Approach

The "futility-acknowledged" approach to the standard acknowledges that, in the absence of reasoned awards, courts cannot

109. *Id.* at 1461.
110. 914 F.2d 6 (1st Cir. 1990).
111. *Id.* at 10.
112. 70 F.3d 418 (6th Cir. 1995).
113. *Id.* at 421.
114. 14 F.3d 1250 (7th Cir. 1994).
115. *Id.* at 1254.
116. *See Reining in Manifest Disregard, supra* note 96, at 125.
117. *See id.*
118. *Id.* at 125-32.

determine the criteria that arbitrators utilize to arrive at their decisions and thus cannot determine if they willfully disregard the law.[119] "The vast majority of circuit appeals opinions applying the 'manifest disregard' of the law standard use this approach. Because this analytical tack never leads to vacatur, it reduces the 'manifest disregard' of the law ground to a nullity."[120] Of the three approaches, this approach gives the most deference to the arbitrators' awards and their evaluations of the facts and relevant law at issue.[121]

2. *The "Big-Error" Approach*

The "big-error" approach involves an undercutting of the standard because the court focuses only on the actus reus element of the offense and assumes the mens rea element.[122] The courts applying this approach look to the clarity of the underlying law and then to the ensuing degree of the mistake that arbitrators make in their awards, focusing solely on how badly, in the courts' judgment, arbitrators misinterpret the law.[123] By neglecting an investigation into the arbitrator's willful disregard or lack thereof, an aggrieved petitioner could convince a court using this standard that the law is so clear that the arbitrator must *necessarily* have violated the law.[124] This second

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119. *Id.* at 125-26.

120. *Id.* at 126; *see also* Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 240 (1st Cir. 1995) ("[Because the] arbitrators do not explain the reasons justifying their award . . . 'appellant is hard pressed to satisfy the exacting criteria for invocation of the doctrine. In fact, when the arbitrators do not give their reasons, it is nearly impossible for the court to determine whether they acted in disregard of the law.'" (citations omitted)); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995) ("Where, as here, the arbitrators decline to explain their resolution of certain questions of law, a party seeking to have the award set aside faces a tremendous obstacle."); Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990) (finding that, since "arbitrators need not explain their award . . . and did not do so here, it is no wonder that [the petitioner for vacatur] is hard pressed to satisfy the exacting criteria for invocation of the [manifest disregard] doctrine" (citations omitted)).

121. *See Reining in Manifest Disregard*, *supra* note 96, at 126.

122. *Id.* at 127.

123. *Id.* This approach "bypasses the 'mens rea' component entirely and relies instead upon an inference of constructive knowledge of the law by the arbitrator based on the clarity of the relevant law and the degree of error reflected in the challenged award." *Id.*

124. *See id.* at 127 nn.41-42 (citing *Jaros*, 70 F.3d at 421).

> [T]he decision must fly in the face of clearly established legal precedent. When faced with questions of law, an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate[] and (2) the arbitrators refused to heed that legal principle.

standard is the most troubling because it "consists of nothing more than a determination of whether the arbitrator made an error of law that a reviewing court is unwilling to tolerate" and because "[i]t presents the prospect of achieving vacatur without being required to prove that the arbitrator actually was aware of the correct interpretation of the relevant law."[125] Despite its obvious attraction to unsatisfied petitioners, this standard is rarely successful, and it serves only to waste time, increase cost, and hamper the effective use of arbitration in general.[126] This approach gives less deference to the arbitrator's interpretation of well-settled law because it assumes that he must have disregarded the law given the legal clarity on the subject and the scale of his error.[127]

3. *The "Presumption-Based" Approach*

The third approach to reviewing the arbitrator's award—the "presumption-based" approach—gives the least amount of deference to the arbitrator's findings of fact and interpretations of law, substituting instead the opinion of the court.[128] The Eleventh and Second Circuits used this approach in *Montes v. Shearson Lehman Brothers* and *Halligan v. Piper Jaffray, Inc.*,[129] respectively, the only two cases to date at the federal appellate court level that have found that the arbitrators manifestly disregarded the law.[130]

In *Halligan*, an employee claimed that his former employer fired him because he was too old.[131] He submitted his age discrimination claim to an arbitral tribunal, at which he presented evidence showing that his bosses fired him because of his age, while his former

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Id. See also Advest, Inc., 914 F.2d at 10 ("In certain circumstances, the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug.").

125. *Reining in Manifest Disregard, supra* note 96, at 127-28.

126. *See id.* at 128. This approach significantly destabilizes commercial arbitration. *See id.*

127. *See id.* at 127.

128. *See id.* at 129-31.

129. 148 F.3d 197 (2d Cir. 1998).

130. *See id.* at 202, 204; Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1461-62 (11th Cir. 1997); *Reining in Manifest Disregard, supra* note 96, at 129-31.

131. *Halligan*, 148 F.3d at 198.

employers presented evidence to show that he intended to resign.[132] The Second Circuit Court of Appeals stated that evidence was in essence a fact intensive inquiry that the arbitral panel had to weigh in making its decision.[133] The panel denied Halligan any relief and offered no explanation or rationale for the result.[134] The court observed that the district court judge found that "the record . . . [did] not indicate the Panel's awareness, prior to its determinations, of the standards for burdens of proof . . . [and that] where [the panel] did not issue a written opinion, [the district court could not] conclude that the panel did in fact disregard the parties' burdens of proof" because it was not the district court's job to reconsider evidence after the arbitral panel had already done so.[135]

The appellate court noted that the manifest disregard of the law defense, which Halligan raised on appeal, consisted of two elements: "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether[] and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case."[136] Despite these statements by the court and despite the usual practice of courts to refrain from re-evaluating evidence presented to a tribunal, the court evaluated the evidence that the tribunal considered.[137] The court noted that the parties' counsel had explained the applicable standards of law to the panel (though no evidence showed that the panel actually understood the law) and that Halligan presented strong evidence in his favor.[138] The court assumed that the panel understood the law and found Halligan's strong evidence convincing: "[Combined with] the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both."[139] Additionally, the court determined that the arbitrators must

132. *See id.* at 198-200.
133. *See id.*
134. *Id.* at 200.
135. *Id.*
136. *Id.* at 202.
137. *Halligan*, 148 F.3d at 204; *see supra* notes 56, 74, 75 and accompanying text.
138. *Halligan*, 148 F.3d at 203-04.
139. *Id.*

have acted in manifest disregard of the law because the panel did not issue a written award.[140]

In *Montes*, an employee appealed the denial of her petition to vacate an arbitrator's decision "denying her claim [for] over-time pay from her former employer."[141] Specifically, she claimed that her employer's lawyer urged the arbitration panel to ignore the relevant law of the Fair Labor Standards Act and to find in favor of the employer.[142] As in *Halligan*, the court in *Montes* indulged in a lengthy review of the facts used by the arbitration tribunal and determined that manifest disregard of the law consists of two steps—that the arbitrator was "conscious of the law" but "deliberately ignored it."[143] However, the court went on to find the following:

> In the absence of any stated reasons for the decision and in light of the marginal evidence presented to it, we cannot say that this [manifest disregard of the law] is not what the panel did . . . as the arbitrators recognized that they were told to disregard the law (which the record reflects they knew) in a case in which the evidence to support the award was marginal. Thus, there is nothing in the record to refute the suggestion that the law was disregarded. Nor does the record clearly support the award.[144]

The court concluded that, since the facts did not support the ruling and since there was no presumption in favor of the arbitrator, the arbitrator must have disregarded the law at the urging of the employer's counsel.[145]

Both of these cases illustrate the essential components of the presumption-based approach.[146] Since the arbitral tribunals did not

140. *Id.* Any finding based on these facts would have been extremely weak. *See id.*

141. Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1458 (11th Cir. 1997); *see Reining in Manifest Disregard*, *supra* note 96, at 129-31.

142. *Montes*, 128 F.3d at 1458.

143. *See id.* at 1462-64.

144. *Id.* at 1461-62. The court went on to note that there was nothing "in the decision itself or anywhere else in the record that refutes the inference that the law was ignored under the circumstances in this case." *Id.* at 1461 n.8.

145. *Id.* at 1464.

146. *Reining in Manifest Disregard*, *supra* note 96, at 129.

explain their awards, the courts embarked on their own review of the facts on record before the tribunal and concluded (1) that the arbitrators must have possessed the correct interpretation of the relevant law and (2) that based on this presumption, the arbitrators necessarily and deliberately disregarded the law, although there were no written findings or concrete holdings that the courts could scrutinize to find out if this was in fact the case.[147] The arbitrators were guilty by silence, and the courts found manifest disregard simply because there was no evidence that the arbitrators had *not* disregarded the law.[148] Both courts arrived at these conclusions after first holding that an arbitrator must (1) affirmatively know what the law is and (2) purposely disregard the law.[149]

This approach allows the court to work backwards.[150] To vacate an unsatisfactory award, a court needs to conduct a review of the record, find satisfactory evidence that the arbitrator knew the correct law, and assume as a result that he necessarily disregarded the law to arrive at such an unjust result.[151] However, there is a problem with this approach:

> [A court may] grant[ ] itself a de facto license, in the course of deciding whether to vacate a challenged award for "manifest disregard" of the law, to reexamine in depth the outcome determinative questions of fact, law and application of law to fact that the parties had contracted to resolve in arbitration. If the outcome reached in arbitration does not jibe with the result indicated by a court's independent evaluation of the facts and the law, vacatur is triggered.[152]

In using these assumptions, the court ignores the fact that the arbitrators may have made a mistake interpreting the law because the

147. *Montes*, 128 F.3d at 1461-62; Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998).
148. *See Halligan*, 148 F.3d at 204; *Montes*, 128 F.3d at 1462.
149. *See Montes*, 128 F.3d at 1461; *Halligan*, 148 F.3d at 202.
150. *Reining in Manifest Disregard*, *supra* note 96, at 130.
151. *Id.*
152. *Id.* at 130-31.

presumption-based approach requires only that a court find that the parties' counsel had advised the arbitrators of the correct law.[153] The significance of this development is threefold. First, by conducting an independent review of the evidence, the courts destroy the old presumption that a reviewing court shall not second guess an arbitrator's evaluation of law or fact.[154] Second, these decisions mandate written opinions for awards to prevent courts from overturning awards in the future based on inferences of manifest disregard drawn from silence.[155] Third, judicial willingness to abrogate awards based on presumptions destroys the finality of arbitral awards.[156]

IV. IMPLICATIONS OF FEDERAL CASE LAW FOR THE CONTINUED VITALITY OF MANIFEST DISREGARD OF THE LAW IN GEORGIA

A. Implications of the Model for Georgia's Arbitration Code

Georgia's manifest disregard of the law defense is new and contains no statutory explanation of the elements of the defense.[157] As a result, courts will have to interpret the law. Thus, Georgia courts can choose either to create their own standard for manifest disregard of the law or to follow the standards that the federal courts have created.[158] Should Georgia courts adopt the federal two-prong test of (1) affirmative knowledge of applicable law and (2) conscious disregard of that law, the courts would have to make a determination of how to evaluate these two prongs.[159] Because commercial awards usually do not contain any reasoning, choosing the factors and tests to use will make arbitration enforcement more confusing and less outcome determinative.[160]

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153. *Id.* at 131.

154. *See id.*; *supra* notes 56, 74, 75 and accompanying text.

155. *See Reining in Manifest Disregard, supra* note 96, at 131. Written awards destroy finality by allowing a court to review an arbitrator's logic and therefore potentially overturn his award. *See id.*

156. *Id.* at 131-32.

157. *See supra* note 34 and accompanying text.

158. *See supra* Part III.

159. *See supra* Part III.B.

160. *Reining in Manifest Disregard, supra* note 96, at 132.

If Georgia courts choose the futility-acknowledged approach, they will adopt an approach that practically eviscerates a new provision of statutory law.[161] However, since most courts today use it, this approach seems to be the most logical.[162] If Georgia courts do adopt this approach, the lack of reasoning common in most commercial awards will render the award impervious to assault from manifest disregard because the courts will not be able to determine the arbitrator's motives, thus rendering the defense useless.[163]

If Georgia courts choose the big-error approach, the newly created standard will be available only when an arbitrator delivers an award that is blatantly contrary to the established law; as a result, it will rarely be useful.[164] In addition, the courts' adoption of this approach would render the first prong of the test—affirmative knowledge of the law—useless.[165] The rareness of instances when this standard will be applicable, combined with the attraction of this option to any party who has lost in arbitration, will create confusion and delay in the arbitral and judicial systems surrounding this infrequently applicable standard.[166]

Should Georgia courts choose the presumption-based approach, the new standard will patently disregard the two distinct elements of the manifest disregard defense because courts applying this approach forgo any subjective determination of (1) what arbitrators actually knew or understood about applicable law and (2) whether they purposefully and willfully disregarded it.[167] The adoption of this last approach, which has been the only one with which courts have to actually found manifest disregard of the law in an arbitral award, would allow judges to replace their discretion for that of the arbitrator.[168] The end result would be an end to the finality of arbitration awards, a practical requirement for written awards, and de

161. *See supra* Part III.B.1.
162. *See supra* Part III.B.1.
163. *See supra* Part III.B.1.
164. *See supra* Part III.B.2.
165. *See supra* Part III.B.2.
166. *See supra* Part III.B.2.
167. *See supra* Part III.B.3.
168. *See supra* Part III.B.3.

facto appellate review of arbitral proceedings, none of which legislatures envision in commercial arbitration schemes.[169]

In summary, while the norm incorporates unexplained awards, the first approach would effectively eliminate the defense of manifest disregard of the law.[170] The second approach would rarely be applicable, but parties would likely invoke it frequently, thus causing much delay.[171] The third approach would be available at the whim of the courts, thus creating appellate review and with it, uncertainty and delay.[172]

None of these options are beneficial to the commercial arbitration scheme in Georgia because adopting manifest disregard will at best do nothing, and at worst severely hamper the finality of arbitration awards and increase costs.[173] Thus, the new addition to the law would create little benefit for and would potentially cause great harm to commercial arbitration, a major beneficiary of the statutory arbitration scheme in Georgia.[174]

B. The Collision of Georgia's Arbitration Code with the Federal Code

In light of recent pronouncements by the Supreme Court, discussion regarding how Georgia should define its manifest disregard standard might become academic.[175] In *Southland Corp. v. Keating*,[176] appellant Southland was "the owner and franchisor of 7-Eleven convenience stores," and appellees were franchisees of Southland.[177] The parties' franchise agreement contained an arbitration clause.[178] Several franchisees filed suit against Southland

169. *See supra* Part III.B.3.
170. *See supra* Part III.B.1.
171. *See supra* Part III.B.2.
172. *See supra* Part III.B.3.
173. *See supra* Part III.B.1-3.
174. *See supra* Part III.B.1-3; *see also* CARBONNEAU, *supra* note 16, at 2-3 (discussing the advantages and problems associated with arbitration for the commercial community).
175. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Southland Corp. v. Keating, 465 U.S. 1 (1984).
176. 465 U.S. 1 (1984).
177. *Id.* at 3-4.
178. *Id.* at 4.

in a California superior court alleging "fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law," and Southland moved to compel arbitration.[179] The California law at issue, as interpreted by the California Supreme Court, required that the state courts, not arbitral panels, settle all claims brought under the statute and dealing with the acquisition of franchises.[180]

The United States Supreme Court found that this interpretation of the law "directly conflicted with § 2 of the Federal Arbitration Act and violate[d] the Supremacy Clause."[181] The Supreme Court held that Congress had "declared a national policy favoring arbitration" and therefore had eliminated the states' ability to require judges to resolve disputes that the parties had agreed to arbitrate.[182] The Court observed, "We see nothing in the [Federal Arbitration] Act indicating that the broad principle of enforceability is subject to any additional limitations under state law."[183]

Noting that Congress derived the power to create a broad scope for the FAA from the Commerce Clause, the Court found that its prior interpretations of Commerce Clause power "clearly implied that the substantive rules of the Act were to apply in state as well as federal courts. . . . [T]he Arbitration Act 'creates a body of federal substantive law,' . . . [and] the substantive law the Act created [is] applicable in state and federal courts."[184] Thus, the FAA governs issues of arbitrability and enforceability in both state and federal court.[185] Congress created the FAA to provide substantive law, applicable in both state and federal courts, requiring parties to observe arbitration agreements and, by so doing, intended "to foreclose state legislative attempts to undercut the enforceability of

179. *Id.*
180. *Id.* at 10.
181. *Id.*
182. *Southland Corp.*, 465 U.S. at 10.
183. *Id.* at 11.
184. *Id.* at 12.
185. *Id.*

arbitration agreements."[186] The FAA preempts state law when that law limits enforceability of arbitration agreements.[187]

The majority responded to Justice O'Connor's dissenting argument that Congress intended that the FAA apply only in federal courts by observing that the legislative history contained strong indications that Congress meant for the FAA to apply in both federal and state courts.[188] Congressional reports showed that the legislators intended to create a broad reach for the FAA and had not intended for state laws to constrain it.[189] The Court noted that Congress intended for the FAA to create substantive rather than procedural law and for this law to apply in both federal and state courts.[190] Since Congress wanted the FAA to apply in state courts, it "would need to call on the Commerce Clause . . . [and] would be limited to transactions involving interstate commerce."[191]

Justice Stevens, concurring in part and dissenting in part, believed that the provision in § 2 of the FAA, which prevents enforcing arbitration agreements when there are present "such grounds as exist at law or in equity for the revocation of any contract," necessarily mandated that the states could create laws that would restrict enforceability of arbitration clauses based on a state's particular public policy.[192] In response, the majority found that the defense to enforceability found in the California statute at issue was "not a ground that exists at law or in equity 'for the revocation of *any* contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law."[193] While Justice Stevens argued that carving out a

186. *Id.* at 16.
187. *See id.* at 15 n.9.
188. *Southland Corp.*, 465 U.S. at 14-15.
189. *See id.* at 12-14.
190. *See id.* at 14.
191. *Id.*
192. *Id.* at 17-18 (Stevens, J., concurring in part and dissenting in part). Section 2 of the FAA states:
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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
9 U.S.C. § 2 (2000).
193. *Southland Corp.*, 465 U.S. at 16 n.11.

special exception for arbitration, which was consistent with state public policy, did not hinder the federal policy behind the FAA, the majority rejected his argument.[194] The Court reasoned that this could allow states to circumvent congressional intent favoring arbitration and that states could then "override the declared policy requiring enforcement of arbitration agreements."[195]

The Court in *Southland* noted that the FAA limited the enforceability of arbitration provisions to contracts "evidencing a transaction involving commerce."[196] The Court defined "involving commerce" in *Allied-Bruce Terminix Cos. v. Dobson*.[197] In *Dobson*, the respondent owned a house that the petitioner protected from termites.[198] The parties had executed a written contract containing an arbitration clause.[199] After a dispute arose between the two, respondent sued petitioner in Alabama state court, and petitioner moved for a stay of litigation pending completion of the arbitration as stipulated in the contract.[200] The trial court denied the stay, and petitioner appealed to the Alabama Supreme Court.[201] That court upheld the denial of the stay based on a state statute that invalidated pre-dispute arbitration clauses.[202] To support its holding, the court had to find that the FAA did not apply because it preempts conflicting state law.[203] The court found that the FAA did not apply because it only applied to contracts in which the parties had *contemplated* substantial interstate activity at the time of contracting.[204]

On appeal to the United States Supreme Court, the respondents first argued that the Court should overturn its earlier holding in

194. *See id.* at 16 n.11.
195. *Id.*
196. *Id.* at 10-11.
197. 513 U.S. 265 (1995).
198. *Id.* at 268.
199. *Id.*
200. *Id.* at 268-69.
201. *Id.* at 269.
202. *Id.* The Alabama Supreme Court relied on Alabama Code § 8-1-41(3) (1993). *See Dobson*, 513 U.S. at 269.
203. *Id.* at 269.
204. *Id.* at 277.

Southland.[205] Reiterating its earlier position that the FAA "pre-empts state law . . . [and that] state courts cannot apply state statutes that invalidate arbitration agreements," the Court refused respondent's request, noting that many private parties had probably relied on *Southland* in writing contracts and that Congress had enacted legislation expanding the scope of arbitration.[206]

The respondents also argued that Congress had limited the scope of the FAA by using the term "involving commerce," which they argued was not the broadest definition that Congress could have created.[207] In response, the Court found that "involving commerce" was broader than the term of art "in commerce" and that, in fact, it was the functional equivalent of "affecting commerce," a term that Congress used to signify the fullest extent of its Commerce Clause powers.[208]

Finally, the respondents argued that Congress had limited "a contract evidencing a transaction involving commerce" to those contracts where parties had contemplated the involvement of interstate commerce.[209] The Court rejected this argument and found that the transaction need only involve interstate commerce *in fact* to be within the reach of the FAA.[210] This definition eliminated any unnecessary wrangling about the parties' original intent regarding interstate commerce.[211]

Based on these two cases, the FAA may preempt Georgia's Arbitration Code whenever an arbitration clause is at issue in a contract that in fact affects interstate commerce.[212] Thus, to the extent that the statutory recognition of manifest disregard of the law exists in Georgia as a barrier to enforcement of arbitration awards that are otherwise enforceable under federal law, the FAA preempts Georgia law and nullifies the manifest disregard defense when the contract affects interstate commerce because the defense is inconsistent with

205. *Id.*
206. *Id.*
207. *Id.* at 273.
208. *Dobson*, 513 U.S. at 273-74.
209. *Id.* at 277 (emphasis omitted).
210. *Id.* at 279.
211. *See id.* at 278-79.
212. *See id.* at 279; Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

the broad scope and public policy the FAA envisioned.[213] In addition, in light of the *Dobson* decision, Georgia courts may not advance the argument that manifest disregard in some cases fits into an exception to the scope of the FAA because the FAA encompasses all transactions that in fact affect interstate commerce, which is a very broad interpretation of the FAA.[214]

C. Is Manifest Disregard of the Law in the Georgia Arbitration Code a Substantive or Procedural Right?

Southland and *Dobson* stand for the proposition that the FAA creates a set of *substantive* rights under federal law that encompass the whole of interstate commerce to the exclusion of state laws.[215] A recent line of Supreme Court cases suggests that the FAA might not cover *procedural* rights created under state arbitration schemes.[216] In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[217] Volt Information Sciences ("Volt") contracted to perform electrical work on a construction project for Leland Stanford Junior University ("Stanford").[218] The contract contained an arbitration clause with a choice of law provision providing that "'[t]he Contract shall be governed by the law of the place where the Project is located.'"[219]

A dispute arose between the parties, and Volt made a demand for arbitration.[220] Stanford, in turn, filed an action against Volt in California superior court for fraud and sought indemnity "from two other companies involved in the construction project, with whom it did not have arbitration agreements."[221] Volt moved to stay litigation pending the arbitration, but Stanford moved to compel litigation

213. *See Southland Corp.*, 465 U.S. at 11 ("We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.").

214. *See Dobson*, 513 U.S. at 273-74, 277.

215. *See id.* at 273-74, 277; *Southland Corp.*, 465 U.S. at 12.

216. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989).

217. 489 U.S. 468 (1989).

218. *Id.* at 470.

219. *Id.*

220. *Id.*

221. *Id.* at 470-71.

based on a California statute that "permits a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it."[222] The superior court denied Volt's motion to compel arbitration and stayed the proceedings, and the California Court of Appeals affirmed.[223] "The Supreme Court of California denied Volt's petition for discretionary review."[224]

The United States Supreme Court affirmed the California Court of Appeals' decision.[225] Although the Court found that lower courts must give due regard to the federal policy favoring arbitration and resolve all ambiguities in favor of arbitration, it nevertheless held as follows:

> There 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. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction . . . [or] any other policy embedded in the FAA.[226]

The Court reasoned that the FAA did not preclude the application of the California statute in this case since the parties had agreed to arbitrate their dispute according to the procedural rules of California.[227]

While noting that federal law may preempt state law when state law stands in the way of Congress's objectives, the Court nevertheless found that the California law at issue, which stayed arbitration, did not undermine the FAA.[228] The Court explained that

222. *Id.* at 471.
223. *Volt Info. Scis., Inc.*, 489 U.S. at 471.
224. *Id.* at 472-73.
225. *Id.* at 473.
226. *Id.* at 476.
227. *Id.* at 477.
228. *Id.* at 477-78.

the FAA did not prevent parties from using procedural rules other than those set out in the FAA; rather, Congress intended for the FAA to encourage the enforcement of private arbitration agreements according to their terms.[229] The Court found that limiting the parties to the procedural rules set forth in the FAA would be contrary to the FAA's primary purpose of "ensuring that private agreements to arbitrate are enforced according to their terms" because arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."[230]

In his dissent, Justice Brennan noted that the application of the California statute to stay arbitration meant that the parties would litigate instead of arbitrating the dispute, thus frustrating the intent of the FAA despite the fact that the Court limited the applicable state law to procedural rules.[231] He argued that the lower courts erred in their interpretation of the parties' agreement, not only because they failed to construe the agreement with an eye towards the federal policy promoting arbitration, but also because they misconstrued the intent of the parties for California law to govern the arbitration in the first place.[232]

Six years later, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[233] the Supreme Court again addressed the issue of state law provisions that limit arbitration.[234] In *Mastrobuono*, petitioners sued respondent, a securities trading firm, in federal district court for fraud.[235] Respondent moved to stay litigation in order to allow arbitration to proceed as stipulated in the parties' contract.[236]

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229. *Volt Info. Scis., Inc.*, 489 U.S. at 478-79.

230. *Id.* at 479.

231. *Id.* at 486-87.

232. *Id.* at 488-90. Since the parties had used a standard form contract, the dissent argued:

> [It was] most unlikely that their intent was in any way at variance with the purposes for which choice-of-law clauses are commonly written and the manner in which they are generally interpreted . . . [They] simply have never been used for the purpose of dealing with the relationship between state and federal law. There is no basis whatever for believing that the parties in this case intended their choice-of-law clause to do so.

Id. at 488, 490.

233. 514 U.S. 52 (1995).

234. *See id.* at 53-54.

235. *Id.* at 54.

236. *Id.*

Subsequently, the arbitral panel awarded compensatory and punitive damages to petitioner, and respondent moved in the district court to vacate the punitive damages award.[237] The district court granted the motion, and the Seventh Circuit Court of Appeals affirmed, with both courts relying on the choice of law provision in the parties' contract, which stipulated that New York law should apply and that the procedural rules of the arbitration should be those rules propagated by the National Association of Securities Dealers ("NASD").[238] The district court and the appellate court based their decisions on a New York law that allowed only judges, not arbitrators, to award punitive damages.[239] The United States Supreme Court framed the question as whether allowing an arbitrator to award punitive damages was consistent with the FAA's policy of ensuring that courts enforce arbitration agreements according to their terms.[240]

The Court relied on *Southland* and *Volt* in forming its decision.[241] Drawing on *Southland*, the Court again reiterated its belief that Congress intended to create a wide-ranging policy favoring arbitration.[242] Relying on the *Volt* decision, the Court reasoned that parties could agree to any procedural rules they wanted, which was the basis of the respondent's argument that the parties could incorporate by agreement New York law that stipulated that arbitrators could not award punitive damages.[243]

The Court began its analysis by noting that, if parties wanted to *include* claims for punitive damages within the arbitration clause, the policy underlying the FAA would allow them to do so, regardless of state law.[244] Therefore, the resolution of this case turned on the interpretation of what the parties had intended when they agreed to let New York law control.[245] The Court, construing NASD rules to

237. *Id.*
238. *See id.* at 54-55, 59 n.2.
239. *Mastrobuono*, 514 U.S. at 55.
240. *Id.* at 53-54.
241. *See id.* at 56-58.
242. *Id.* at 56.
243. *See id.* at 57-58.
244. *Id.* at 58.
245. *See Mastrobuono*, 514 U.S. at 58.

allow punitive damages, found that this construction was at odds with respondent's interpretation of the choice of law clause, which the respondent argued prevented an arbitrator from awarding punitive damages.[246] Since the choice of law provision was at best ambiguous, the Court utilized the common law presumption against the drafter (respondents) to find that the choice of law provision authorized punitive damages.[247] The Court observed that the petitioners could not have known about New York's approach to punitive damages or known that, by signing this standard form contract, they would "be giving up an important substantive right."[248] Additionally, since courts must give effect to all contractual provisions and since these provisions should be consistent with one another, the Court reasoned that the best way "to harmonize the choice-of-law provision with the arbitration provision [was] to read 'the laws of the State of New York' to encompass *substantive* principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators."[249]

Both *Volt* and *Mastrobuono* involved state law provisions, which in some way hampered the functioning of the arbitral tribunal.[250] In *Volt*, the Court enforced the state law provision, but the Court in *Mastrobuono* refused to do so.[251] The only way to reconcile these two cases is to view them as extensions of the Court's long-standing policy of allowing the FAA to enforce arbitration agreements as written.[252] Thus, in *Volt*, where there was no ambiguity as to the applicability of the choice of law provision, the parties' intent controlled, but in *Mastrobuono*, an additional provision allowing for the application of NASD procedural rules caused ambiguity as to the parties' intent in relation to the choice of law provision.[253]

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246. *Id.* at 60-62.
247. *Id.* at 62-63.
248. *Id.* at 63.
249. *Id.* at 63-64 (emphasis added).
250. *See id.* at 55; Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 471 & n.3 (1989).
251. *See Mastrobuono*, 514 U.S. at 64; *Volt Info. Scis., Inc.*, 489 U.S. at 479.
252. *See Southland Corp.*, 465 U.S. at 10-11.
253. *Mastrobuono*, 514 U.S. at 62-64; *Volt Info. Scis., Inc.*, 489 U.S. at 479.

Another distinction between the two cases is the Court's determination that the choice of law provision in *Volt*, as it related to the California statute at issue, encompassed only state procedural rights, which the parties may utilize since the Court should give the parties' intent full effect.[254] In contrast, the Court in *Mastrobuono* characterized the right to punitive damages as a substantive right, and when faced with a conflict between a state law limiting a substantive right in arbitration and the federal law, which favors expansive substantive rights for arbitration, the federal law wins.[255]

A third distinction between the two cases involves the parties themselves.[256] In *Volt*, the petitioner was a corporation, and the respondent was a university.[257] The petitioners in *Mastrobuono* were a professor of medieval literature and his artist wife, and the respondent was a large securities firm.[258] The result was that the Court in *Volt* characterized the state law at issue as *procedural* and thus gave it effect, presumably because the parties were sophisticated enough to negotiate the contract; therefore, if they included an arbitration clause with a choice of law provision, they must have meant for state procedural laws to control.[259] In contrast, the individual petitioners in *Mastrobuono* received a standard form contract, which respondent, a large securities firm, drafted and presented to petitioner with no room for negotiation.[260] There, the Court found that, given this disparity in power and the presumption against the drafter, the state law at issue encompassed a *substantive* right that the parties could not give up under federal law.[261]

Assuming the FAA does not completely preempt Georgia's manifest disregard of the law defense and its arbitration code in general, a court would have to recognize the FAA's long-standing policy in favor of enforcing arbitration contracts as written under the

254. *See Volt Info. Scis., Inc.*, 489 U.S. at 474-75.
255. *See Mastrobuono*, 514 U.S. at 64.
256. *See id.* at 54; *Volt Info. Scis., Inc.*, 489 U.S. at 470.
257. *Volt Info. Scis., Inc.*, 489 U.S. at 470.
258. *Mastrobuono*, 514 U.S. at 54.
259. *See Volt Info. Scis., Inc.*, 489 U.S. at 479.
260. *See Mastrobuono*, 514 U.S. at 63-64.
261. *See id.* at 62-64.

Volt/Mastrobuono analysis.[262] If a court holds to the logic of *Volt/Mastrobuono* and the underlying policy of the FAA, it must then decide if invocation of the manifest disregard defense will affect substantive or procedural rights of the parties to have their arbitral agreements and awards enforced as the FAA requires.[263] If the right is substantive, the FAA preempts Georgia law to the extent that Georgia law would give a less expansive implementation of parties' agreements; if the right is procedural, Georgia's manifest disregard defense will be available to parties in arbitration in spite of any inconsistency with federal law if the parties choose to be governed by Georgia law.[264] This substantive-procedural distinction will depend on whether the reviewing court uses the *Volt/Mastrobuono* analysis that the Supreme Court used above and whether the parties involved are two corporations or a corporation and an individual.[265]

Under this analysis, a court would be more likely to view manifest disregard of the law as a procedural right when a case involves two corporate parties that have negotiated their rights as opposed to a case against an individual who has signed a form contract with little negotiation on his own behalf.[266] The defense, if available, would most likely be a procedural defense only for savvy corporations against other corporations since a reviewing court would be loath to find that an individual had surrendered important substantive rights under the FAA's expansive policy by signing a form contract to arbitrate.[267] Surely, the drafters of Georgia's manifest disregard law could not have had this in mind when they voted to adopt the defense as a consumer protection measure because the class of people (consumers and individuals) that they were ostensibly trying to protect could rarely invoke the new right.[268]

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262. *See Mastrobuono*, 514 U.S. at 58; *Volt Info. Scis., Inc.*, 489 U.S. at 478; Southland Corp. v. Keating, 465 U.S. 1, 11 (1984); *see also supra* Part IV.B.

263. *See Mastrobuono*, 514 U.S. at 64; *Volt Info. Scis., Inc.*, 489 U.S. at 479.

264. *See Mastrobuono*, 514 U.S. at 64; *Southland Corp.*, 465 U.S. at 12.

265. *See Mastrobuono*, 514 U.S. at 54, 63-64; *Volt Info. Scis., Inc.*, 489 U.S. at 470-71, 479; *Southland Corp.*, 465 U.S. at 12.

266. *See Mastrobuono*, 514 U.S. at 54, 63-64; *Volt Info. Scis., Inc.*, 489 U.S. at 470-71, 479.

267. *See Mastrobuono*, 514 U.S. at 54, 63-64; *Volt Info. Scis., Inc.*, 489 U.S. at 470-71, 479.

268. *See supra* notes 37, 38 and accompanying text.

D. Other Considerations for Manifest Disregard of the Law in Georgia

Manifest disregard of the law is a complex and nuanced doctrine that does not encourage the speed and efficiency that many consider to be the hallmarks of commercial arbitration.[269] It is a vague doctrine that courts may interpret in any number of ways; this inevitably decreases the utility of arbitration as a viable means of alternative dispute resolution, especially in the commercial arena.[270] In addition, many commentators question whether the doctrine is still good law, considering certain cases and changing attitudes towards arbitration.[271] Perhaps one indication of the confusion caused by the doctrine and its questionable utility to arbitration is the fact that no other state has followed Georgia and codified it as a defense.[272] In Georgia, the legislature enacted the doctrine to provide protection to consumers from what it perceived to be unfair arbitration practices.[273] However, the ad hoc doctrine offers little in the way of consumer protection and instead hampers commercial enterprise, a major

269. *See supra* Part III.B.

270. *See supra* Parts III.B, IV.A-C.

271. *See Reining in Manifest Disregard*, *supra* note 96, at 121, 122 & n.24. Professor Hayford took notice of the Supreme Court's recognition of the erosion of the "old judicial hostility to arbitration" throughout the years. *Id.* at 121. The Supreme Court, in the 46 years since the creation of the doctrine, has never satisfactorily defined the manifest disregard framework or how it fits in with the statutory grounds for vacatur. *Id.* at 121-22. The Court reversed the *Wilco* holding that claims under the Securities Act of 1934 were inarbitrable in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989). In *Rodriguez de Quijas*, the Court stated that "'[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Reining in Manifest Disregard*, *supra* note 96, at 121 (quoting *Rodriguez de Quijas*, 490 U.S. at 481-82). The Court did not address the manifest disregard defense. *See id.* at 121. However, since Georgia's manifest disregard is a statutory construct, the overruling of *Wilco* does not carry as much weight as it would with case law.

272. A search on "manifest disregard of the law" in state statutes on Westlaw pulls up several statutes. Of these, one is the new Georgia law. In the three North Carolina laws that come up, the phrase appears in the Uniform Law Comments and not the text of the statutes themselves. *See, e.g.*, N.C. GEN. STAT. § 1-569.23 (Supp. 2004). One of the comments to the statutes mentions that the legislature had considered adopting it as a defense but that a committee struck down this idea in 2000. *See id.* The final mention of the standard is in a Texas law on *residential construction* arbitration. TEX. PROP. CODE ANN. § 438.001 (Vernon Supp. 2004). The law states that "[i]n addition to grounds for vacating an arbitration award under [the civil procedure code,] . . . a court shall vacate an award in a residential construction arbitration . . . for manifest disregard [of the] law." *Id.* The defense is not generally available to all arbitrations as in Georgia.

273. *See supra* notes 35, 38 and accompanying text.

beneficiary of arbitration in Georgia.[274] Finally, Georgia law might be in conflict with itself. While the legislature meant for manifest disregard of the law to limit the power of arbitrators, O.C.G.A. § 9-9-13(d) allows arbitrators to fashion any kind of relief they see fit.[275]

E. Consumer Protection: More Than Patchwork Is Necessary

At present, Georgia law provides consumers with some protection.[276] However, protection for consumers is necessary at a national level as well.[277] As a result of form contracts and consumer ignorance, consumers often give up important tort, civil, and employment rights or unknowingly submit themselves to heavily biased arbitrations.[278] One solution is to simply restrict predispute arbitration clauses to businesses or to those with equal bargaining power.[279] This way, consumers could choose to use arbitration even after the dispute arose if it was truly more equitable and efficient than litigation.[280] Also, states and the federal government could enact consumer protection laws that specifically exempt consumer transactions from predispute arbitrations.[281] Although a full discussion of the many necessary consumer protection measures is beyond the scope of this Note, legislatures need to do something to protect consumers and to salvage arbitration for those industries that rely on it to provide effective dispute resolution.[282]

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274. *See supra* Parts III.B, IV.A-C.

275. *See* O.C.G.A. § 9-9-13(d) (Supp. 2004). The statute provides in pertinent part that "[t]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." *Id.*; *see supra* note 34.

276. *See supra* note 37. The existence of O.C.G.A. § 9-9-2, which prevents arbitration in statutorily defined consumer matters, would seem to accomplish much more for consumers than the addition of the manifest disregard defense ever could. *See* O.C.G.A. § 9-9-2 (Supp. 2004); *supra* Part IV.A-C. However, the question of whether the FAA preempts this provision because it is too restrictive of all arbitrations is beyond the scope of this Note. *See supra* Part IV.A.

277. *See* Paul D. Carrington, *The Dark Side of Contract Law*, TRIAL, May 2000, at 73; Jean R. Sternlight, *5 Steps Need to Be Taken to Prevent Unfairness to Employees, Consumers*, DISP. RESOL. MAG., Fall 1998, at 5, 7.

278. *See* Carrington, *supra* note 277, at 73-76.

279. *See* Sternlight, *supra* note 277, at 7.

280. *See id.*

281. *See* LIMITATION ON CONSUMER ARBITRATION AGREEMENTS (National Consumer Law Center), http://www.nclc.org/initiatives/model/limits_consumerarbitration.shtml (last visited Nov. 29, 2003).

282. *See* Sternlight, *supra* note 277, at 8.

CONCLUSION

Arbitration is one of the main means of alternative dispute resolution today and is gaining prominence.[283] Arbitration is the submission of a dispute between two people to a neutral third person or panel for a binding decision on the matter.[284] Some benefits of commercial arbitration include speed, economy, and confidentiality.[285] The FAA is the body of law governing arbitrations in the United States.[286] Congress intended for the FAA to honor parties' agreements, yet at the same time, the FAA seeks to preserve the finality of awards and not to allow vacation simply because one side is dissatisfied with the result.[287]

Recently, the State of Georgia amended its arbitration code to provide for a fifth defense to the enforcement of arbitration awards—manifest disregard of the law.[288] Despite the absence of the defense in Georgia's common law, the Georgia General Assembly ultimately codified manifest disregard as a consumer protection measure.[289]

The manifest disregard of the law defense originated from dicta in the Supreme Court case of *Wilco v. Swan*.[290] Since then, the Supreme Court has failed to elaborate on the defense in any significant detail, leaving it to the circuit courts to define the standard.[291] Courts in cases relating to manifest disregard of the law often apply one of three approaches.[292] Whichever approach Georgia courts take towards defining the standard, none of these three options will create a favorable standard for commercial arbitration in the State.[293]

Regardless of the approach that Georgia courts take, Supreme Court case law, which favors striking down state laws that interfere

283. *See supra* INTRODUCTION.
284. *See supra* Part I.
285. *See supra* Part I.
286. *See supra* Part I.
287. *See supra* Part I.
288. *See supra* Part II.
289. *See supra* Part II.
290. *See supra* Part III.A.
291. *See supra* Part III.A.
292. *See supra* Part III.B.
293. *See supra* Part IV.A.

with the broad congressional mandate to encourage arbitration, may preempt the Georgia Arbitration Code.[294] In addition, even if the FAA does not preempt the Georgia Arbitration Code, courts may still question the nature of the manifest disregard of the law defense in cases where the parties choose to be governed by Georgia law.[295] Should a court construe the manifest disregard of the law defense as a substantive right, then the FAA would preempt it to the extent that the two conflict.[296] However, should a court construe the manifest disregard defense as a procedural right, the FAA would likely not preempt it; a court using the *Volt/Mastrobuono* reasoning would most likely rule that the defense impinges on substantive rights for consumers and not allow it in cases against consumers.[297] The Georgia manifest disregard of the law defense faces other explanatory hurdles besides those listed above.[298] Regardless, arbitration in Georgia and in the country as a whole must be fair and useful for all parties so that they may resolve disputes quickly, cheaply, and fairly.[299]

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294. *See supra* Part IV.B.
295. *See supra* Part IV.C.
296. *See supra* Part IV.C.
297. *See supra* Part IV.C.
298. *See supra* Part IV.D.
299. *See supra* Part IV.E.