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California's SB 766: A Step in the Right Direction for International Arbitration in the Golden State

As the world's fifth-largest economy and a hub for some of the world's biggest and boldest companies, California has long been at the cutting edge of technology, culture, and innovative business models. One area where California has curiously lagged behind its peer states in the U.S. is on the topic of international arbitration—the preferred method of dispute resolution for most transnational companies.

Over the past few decades, California has demonstrated a reluctance to embrace international arbitration, in contrast to the ever-strengthening laws and judicial decisions handed down at the state and federal level in other jurisdictions in support of the autonomy of arbitral tribunals convened under private international contracts. Among some of the factors that has made California less attractive in the eyes of those who practice international arbitration was the state's longstanding ban that prevented non-U.S. and out-of-state attorneys from representing clients in international arbitrations, or from serving as arbitrators. This meant that only California-licensed lawyers could act in California-seated international arbitrations (even if California law did not govern the merits of the dispute), which drastically reduced the pool of qualified lawyers, particularly given that the California Bar is one of a minority of states that does not extend reciprocity to U.S. lawyers qualified in other states.¹ In practical terms, this often led companies to seat their arbitrations elsewhere. But just last week, on July 9, 2018, the California legislature did away with this outdated rule by passing SB 766, which Governor Jerry Brown is expected to sign. SB 766 permits attorneys qualified in other jurisdictions to serve as counsel or arbitrator in international arbitrations seated in California, with limited restrictions.

The wise decision of the California legislature to open up international arbitration practice to out-of-state lawyers helps to bring California up to speed with other arbitration-friendly jurisdictions, which have long courted arbitrations in their cities as a major economic benefit and a boon to local legal communities. We can expect to see more international businesses



agreeing to seat their arbitrations in California, now that the possibility is more likely that they can be represented by their counsel of choice. In particular, the move is smart in light of California's natural connections to the Asia-Pacific region, and in light of increased (and further-progressed) steps already taken by cities such as Atlanta, Houston, and Miami to update their own international arbitration codes and procedures, as well as their hearing-hosting amenities, in order to appear as attractive options to those seeking a neutral dispute-resolution locale.

But beyond SB 766, California still has some work to do. The 1988 California International Arbitration and Conciliation Act ("CIACA") is based on the UNCITRAL Model Law, which provides some comfort to those seeking stability and predictability in an international arbitration seat. But the CIACA, now 30 years old, is largely procedural and does not speak to enforcement, so any gaps are filled by the domestic California Arbitration Act and the Federal Arbitration Act, leading to uncertainty.² The CIACA also states that it, not the FAA, "applies to international commercial arbitration 'subject to any agreement which is in force between the United States and any other state or states,'" again creating uncertainty as to whether the FAA (the U.S. codification of the 1958 New York Convention on the Enforcement of Arbitral Awards) applies to California-based international arbitrations, and whether parties can control the result by contract.³ The answer to that question has real impact, as California laws differ from the FAA on bases for set-aside, the enforceability of non-final awards, and the length of statutes of limitations. California also continues to allow parties to contract for the expansion of judicial review of arbitration agreements and arbitration awards,⁴ enhancing parties' freedom of contract (but, again, causing some consternation among international arbitration practitioners who are wary of court intervention in a process that, by its nature, should prioritize streamlining and finality). California's expansive approach to document and evidence disclosure also puts it at odds with the international practice favoring far more limited discovery, and indeed many parties select arbitration to avoid the time and expense involved in "American-style" litigation.

In sum, the passage of SB 766 heralds a welcome development in favor of international arbitration for commercial disputes based in California. While remaining true to its principles, the authors are hopeful that the state will continue to progress its international arbitration code to allow corporations and sophisticated parties the freedom to fashion enforceable dispute-resolution mechanisms that work in the global business community. California should not delay development of laws that create a competitive framework for business-to-business disputes in the international context. If it does, the Golden State will lose a golden opportunity for some of the world's great corporate centers, like Los Angeles and San Francisco, to be the world's next major arbitration venues.

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¹ Victor Li, “Reciprocity fight returns as lawsuits press the ABA-advocated issue, ABA Journal, Feb. 2014, available at http://www.abajournal.com/magazine/article/reciprocity_fight_returns_as_lawsuits_press_the_aba-advocated_issue/.

² Victoria Vlahoyiannis, *The Reality of International Commercial Arbitration in California*, 68 Hastings L.J. 4, at 918 (2014).

³ *Id.*; see also *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 194 (2014) (stating that parties cannot opt out of the FAA entirely).

⁴ *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 606 (Cal. 2008).