California—A Rising Star Among International Arbitration Seats

By Gary Benton and Katalin Meier

The International Arbitration Spotlight on California

California's new international arbitration legislation, Article 1.5 of the California International Commercial Arbitration and Conciliation Act, effective January 1, 2019, promises to improve California's standing as an international arbitration seat and, in so doing, provide new opportunities for all international arbitration practitioners.

International arbitration is the preferred dispute resolution tool for commercial disputes between parties from different countries.[1] Although U.S. companies and their counsel are more familiar with U.S. litigation, companies involved in international commerce are increasingly turning to the more effective and efficient dispute resolution offered through international arbitration.

Few parties to an international dispute are willing to put faith in the hands of a foreign country's courts. The main reason why international arbitration is the preferred means for international business dispute resolution is trust: international arbitration offers impartial, independent and experienced arbitrators to address complex, multi-jurisdictional claims that cannot be readily resolved by local courts.

Although for many years international arbitration was largely focused on Europe, particularly London, Paris and Geneva, along with several other respected regional seats, there has been a significant shift over the years. New York is one of the top international seats and seats in Asia have recently achieved international prominence.

In the United States, California has also long played a role as a seat for international arbitration.[2] According to ICC statistics, California is the second most utilized seat for ICC international arbitrations in the United States.[3] Other U.S. jurisdictions are notable in specific sectors. Washington, D.C. has a strong presence for investor-state arbitration. Texas has consistently held a share for oil- and gas-related arbitration. In recent, years, Florida has developed a growing role in Latin America-related work. With respect to substantive law, the most frequent choice was New York law, followed by California law and Delaware law.[4]

Comparison of U.S. seats does not provide a full perspective on challenges and opportunities for international arbitration in the U.S. The more important consideration is that there has been substantial growth in Asia, particularly in the past decade, both with respect to leading efforts by Hong Kong and Singapore, and with respect to regional efforts to capture market share. This regional activity includes activity in Southeast Asia, India, Korea and Japan and as well as recent initiatives by a number of rapidly developing institutions in mainland China. As a result of the rise and growth of Asian institutions, parties in Asia have less incentive to look to Paris, London or New York for their arbitrations.

The challenge for the U.S. (and the rest of the world outside Asia) is to remain relevant given this shift toward Asia. Fortunately, the shift parallels a rise in the volume of arbitrations, meaning increased opportunities for all. California, which has long been focused its attention more to Asia than Europe, is well-positioned to capture a significant portion of Asia and Pacific Rim arbitration for the United States. Indeed, increased international arbitration activity in California offers to significantly expand international dispute resolution opportunities for all U.S. practitioners.

Why International Arbitration in California?

California is the fifth largest economy in the world and, in the U.S., the leading exporter to Asia and Europe. California's current GDP tops $2.7 trillion—a figure steadily growing each year.[5] California's economic strength and geographic position gives it an edge in international business and dispute resolution.

California's position is compelling. However, until recently, California faced a challenge in developing its potential as an international arbitration seat due to some uncertainty as to whether foreign counsel could represent their clients in international arbitration in California. That uncertainty was used by critics to question California's commitment to international arbitration. This has been detrimental to international arbitration practice throughout the US. While critics debated the merits of international arbitration in California, Pacific Rim arbitration has flourished and increasingly shifted to Asia. California's confirmation that foreign counsel can arbitrate in California will strengthen the opportunity for Pacific Rim arbitration in the U.S.

What most of the leading arbitration seats have in common is that their laws and legal climate favor international arbitration. All abide by commitments to enforce

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agreements and awards and provide appropriate judicial support. They promise due process and the rule of law and their courts provide fair and independent decision-making. They have a professional base of international practitioners and a sound infrastructure to support international business and practice. California has long offered all of these elements.

In nearly all the leading jurisdictions, foreign counsel are allowed to represent parties in international arbitration proceedings pursuant to inclusive "fly-in-fly-out" (FIFO) representation laws. California arguably lagged as to this one factor.[6] That has been resolved. Effective January 1, 2019, California has adopted new, strong FIFO statutory protections in Article 1.5 of the California International Commercial Arbitration and Conciliation Act (CIACA; Title 9.3 of the California Code of Civil Procedure (Cal CCP), § 1297.11 *et seq.*). As of January 1, 2019, California will have one of the world's most inclusive FIFO rules, allowing out-of-state and foreign counsel to represent their clients in international arbitrations in California. Under the statute, no pro hac vice admission or registration is required for international arbitration.

The new Article 1.5 of the CIACA allows a foreign or out-of-state attorney to participate in a California seated arbitration if *any* one of five broad conditions is met:

i. The services are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter;

ii. The services arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice;

iii. The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or otherwise authorized to practice;

iv. The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice; or

v. The services arise out of a dispute governed primarily by international law or the law of a foreign or out-of-state jurisdiction.

Presumably all international arbitration practitioners meet the standard under the new statute and even domestic practitioners are allowed to represent their clients in California under the broad wording of the statute. Out-of-state and foreign attorneys representing parties in international arbitrations in California are required to comply with the same professional standards as attorneys admitted in California. (CCP 1297.188(a).)

This legislative statement should resolve all uncertainties as to whether California is a favorable jurisdiction in which to conduct international arbitration. New York practitioners should give thoughtful consideration to the benefits of this development. While some may see California as a competitive threat, the reality is that California provides new opportunities. International businesses and practitioners now have the clear opportunity to conduct US-based international arbitration on the Pacific Rim with their counsel of choice.

In reality, California has always been an attractive forum for international arbitration. California was one of the first U.S. jurisdictions to adopt an international arbitration statute—the California International Arbitration and Conciliation Act was enacted in 1988. More significantly, California's statute is one of the few in the U.S.-based on the UNCITRAL Model Law.[7] This UNCITRAL Model Law based legislation has long offered international parties a highly recognizable and favorable statutory environment for international arbitrations.

"California's new legislation ensures that out-of-state and foreign practitioners can represent clients in international arbitrations in California."

In addition, California has an impeccable record for enforcement of international arbitration agreements and awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Although the California state courts, and to some extent the Ninth Circuit, are notable for asserting employee and consumer protections in domestic arbitration, both the state and federal courts in California have shown strong deference to international commercial arbitration and can be readily relied upon to provide appropriate judicial assistance in international arbitration consistent with UNCITRAL Model Law standards.[8]

California's position as a business and innovation center also helps make it an attractive place to conduct an arbitration. California is home to robust innovative international businesses including leaders in technology, entertainment, finance, shipping, sports, music, agriculture, hospitality and renewable energy to name a few. California's entrepreneurial outlook constantly generates new business and in turn new legal issues. Accordingly, California case law is well developed in many innovation sectors. Such broad and deep know-how is of an immense

value when parties look for fair and reasonable arbitral results.

Likewise, California is home to many major international law firms and has many experienced and sophisticated international practitioners, including in technology and intellectual property. Under California's new law, it is now clear that parties in California will also have the opportunity to access the expertise of international arbitration practitioners from all over the world.

Also, like other United States jurisdictions, California strongly favors arbitrator independence and impartiality. Although California's rigorous domestic arbitration disclosure rules do not apply in international arbitration, arbitrators practicing in California are unhesitant about making full disclosures. Such an allegiance to due process and disclosure provides protections for parties rarely found outside the U.S.

Importantly, California is a strong proponent of and has been a leader in implementing mediation and other alternative dispute resolution techniques. California has demonstrated openness to flexible approaches to resolve legal disputes, including a strong tradition of mediation. This is not just by coincidence: mediation has always been a preferred ADR method in the sports, music and the film industry, where time and cost-efficient solutions are critical. And those international cases for which mediation is not the appropriate resolution (e.g., cases needing an enforceable award) can be resolved by arbitration. This affinity toward ADR and particularly settlement arguably fits well with Asian based models of conciliation and hybrid arbitration-mediation dispute resolution.

Finally, California is ideally situated geographically to serve as a focal point for trade with Asia and the Pacific. Several Asia-based institutions, including the Korean Commercial Arbitration Board (KCAB) and the Shenzhen Court of International Arbitration (SCIA), have already set up offices in California to both attract cases to Asia and administer arbitrations in California. Further, California is attractive to parties in countries around the Pacific Rim who may choose New York substantive law (or the substantive law of other Western jurisdictions) but prefer not to travel the extra distance to the East Coast.

Domestic arbitration institutions are also expanding their international arbitration activities in California. For example, JAMS, traditionally a strong domestic provider, is opening a new International Arbitration Center in Los Angeles and has announced plans for a similar facility in San Francisco. Other international providers are carefully considering their next steps.

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"The expansion of international arbitration in California provides all international arbitration practitioners a U.S. beachhead on the Pacific Rim."

Conclusion

California's rise in international arbitration brings new promise for Pacific Rim dispute resolution and shines a spotlight on California. It offers businesses in the U.S. and throughout the Pacific Rim better alternatives for effective and efficient international dispute resolution. It offers arbitration practitioners and providers new op-portunities for East-West engagement. For international arbitration practitioners in New York and elsewhere in the US, California promises new opportunities for West Coast, Asia and other Pacific Rim arbitration work.

Endnotes

1. Queen Mary, University of London and White & Case: 2018 International Arbitration Survey: The Evolution of International Arbitration.
2. Queen Mary, University of London and White & Case: 2018 International Arbitration Survey: The Evolution of International Arbitration.
3. "Out of the 58 ICC cases seated in the USA, 28 were in New York, seven in California, six in Florida (Miami), three in Texas (Houston), and one in each of Iowa, Indiana, Nevada, Hawaii, Minnesota, Utah and the District of Columbia." 2017 ICC Dispute Resolution Statistics, in: International Chamber of Commerce, Dispute Resolution Bulletin 2018, Issue 2, at 60.
4. 2017 ICC Dispute Resolution Statistics, in: International Chamber of Commerce, Dispute Resolution Bulletin 2018, Issue 2, at 61.
5. Eric Z. Chang, Golden Opportunities for The Golden State: The Rise of International Arbitration in California, California Litigation Vol. 31, No. 2 (2018), at p. 35.
6. The uncertainty in California regarding the right of foreign counsel to appear in arbitrations can be traced to a 1998 California Supreme Court case, Birbrower, Montalbano, Condo & Frank Superior Court of Santa Clara County, 17 Cal. 4th 119 (1998). Although Birbrower was not an international arbitration case and actually contained language favorable to representation by foreign counsel in international proceedings, it was read by some as a threat to foreign counsel. The California legislature adopted a registration requirement for out of state counsel appearing in domestic arbitration and, in so doing, left a gap with respect to international arbitration. Over the past years, there have been several attempts to clarify this situation. The

California legislature, with the support of the Supreme Court and the Governor, determined that resolving any ambiguity will benefit the overall economy of the state as well as strengthen international arbitrations in the United States in general. See Eric Z. Chang, *Golden Opportunities for The Golden State: The Rise of International Arbitration in California,* California Litigation Vol. 31, No. 2 (2018).

7. California International Commercial Arbitration and Conciliation Act; Title 9.3 of the California Code of Civil Procedure, § 1297.11 et seq., added by Stats. 1988, Ch. 23, Sec. 1.

8. Domestic arbitration in California is governed by a different statute than international arbitration, the California Arbitration Act; Title 9 of the California Code of Civil Procedure, § 1280 *et seq*, Other criticisms of arbitration in California, *e.g.,* legislation requiring detailed arbitrator disclosures, do not apply in international arbitration.