Kluwer Arbitration Blog

A Look at California's International Arbitration Future

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"If they can't do it in California, it can't be done anywhere." – Novelist Taylor Caldwell

From its sunlit beaches to its fog-spangled hills, California hosts the world's fifth largest economy, boasting among its accomplishments Hollywood entertainment, Silicon Valley technology, and Central Valley agricultural produce. In addition to its strong trade ties within the Americas and with Asia, California is home to the largest shipping ports in the Americas, and Los Angeles is the busiest port in the Western Hemisphere. And with a focus more on Asia than Europe and a commitment to due process, diversity, and leadership in industry, trade, and innovation, California is uniquely positioned as a gateway for trade and growth throughout the Pacific region.

California, being California, is ever in search of the next new "it." California's $3.1 trillion economy, fine weather, good wine, and multi-cultural embrace make it a welcoming destination for new opportunities. From the looks of it, international arbitration is poised to be California's next starring role.

An UNCITRAL Model Law Jurisdiction that Protects Parties

Many attribute California's delay in becoming a leading international arbitration seat to legislative or judicial hostility. But the fact is that California adheres to a nationwide policy favoring commercial arbitration. California's main problem is that it has been misunderstood.

So let's talk about the misperceptions. When it comes to commercial arbitration, particularly international arbitration, California has impeccable credentials. California is an UNCITRAL Model Law jurisdiction. In fact, it is one of just a handful of US states that have adopted the Model Law. Moreover, California has a strong record for supporting international arbitration and enforcing international agreements and awards.

Like the rest of the US, California leans toward some degree of US-style discovery in arbitration, but there are many well-trained international counsel and arbitrators in California who appreciate and respect customary limits of information exchange in international arbitration, such as those articulated in the IBA Rules on the Taking of Evidence in International Arbitration. Reliance disclosures and limited and narrow document requests are the norm when sophisticated international counsel and arbitrators are engaged.

Some complain that California law imposes a heavy burden for ethical disclosures. That view is also misplaced in international arbitration because the statutory provisions requiring fuller disclosures apply only to domestic arbitration. California's International Arbitration and Conciliation Act (CIACA), §1297.11 et seq, which applies to international arbitrations seated in California, expressly supersedes these provisions, and requires the same level of disclosure as the ABA Code of Ethics for Arbitrators in Commercial Disputes and institutional rules, as in New York and other states. Regardless, it is true that international arbitrators serving in California have a heightened awareness of disclosure responsibilities. That is a good thing for parties and the integrity of international arbitration.

Finally, many have pointed to the 1998 California Supreme Court's *Birbrower* decision, 17 Cal. App. 4th 119 (Cal. 1998) to challenge California's support for international arbitration (for example, this post from 2017). That domestic case addressed whether an out-of-state law firm could perform legal services in California. California's legislature promptly implemented a registration process for non-California lawyers in domestic cases in 1999 and, to resolve any uncertainty, passed legislation in 2018 expressly permitting non-California lawyers to appear in international arbitrations in California without any registration or local counsel requirements (for more, see here). *Birbrower* is now a closed chapter.

Looking to the Atlantic and the Pacific

From 1985 until shortly before 2000, San Francisco was the home of the AAA-Asia/Pacific Center for the Resolution of International Business Disputes. Its mission was to promote California (and Hawaii) as international arbitral seats. What has really held back California for so many years since then has not been hostility to arbitration; rather, it is a lack of an organized and ongoing effort.

For the most part, California did little while other jurisdictions acted. International arbitration in California has had limited collective leadership, only remote institutional support, and no engagement with state and local governments. Initiatives to establish a California Arbitration Center were short-lived and more recent efforts failed to build consensus. Practitioners in California are now looking to what other jurisdictions have done right and how California can advance further.

New York provides a useful case study. In 1996, the American Arbitration Association ("AAA") created its new international division, the International Centre for Dispute Resolution (ICDR), and based it in New York. The focus by AAA on New York, and the more recent collaborative initiative by major law firms there to establish the New York International Arbitration Center provided the catalyst needed to shift some of the focus on international arbitration from Europe to New York. It was that initiative that allowed New York, in just recent decades, to become a major arbitral seat.

Other jurisdictions have followed parallel trajectories. In the late 1980's and early 1990's, jurisdictions in Asia, particularly Hong Kong and Singapore, took steps to meet the growing need for international business dispute resolution there. Those initiatives led to the rise of the Hong Kong International Arbitration Centre in Hong Kong and the Singapore International Arbitration Centre in Singapore, jurisdictions that now rank among the top five global arbitration seats. New arbitral institutions continue to sprout and prosper in Asia.

The delay in developing California as an international arbitration seat has left a void that reaches

beyond California itself. For many, New York is too far away from Asia, in both distance and focus, to support international arbitration between North America and Asia. The result is that international arbitration is inconvenient for US companies doing business in Asia, and Asia-based companies have little incentive to use the US as a seat.

California is now moving forward. Rather than competing with other jurisdictions, California is looking to collaborate and offer itself as a welcoming hearing locale for arbitral institutions around the world. As detailed below, recent initiatives are promising.

Eureka! California, the Golden State

Just a few months ago, California international practitioners formed California Arbitration ("CalArb"), an organization to serve as "the voice of [the] California international arbitration and ADR community." This rapidly growing group has brought together professionals from across the state and internationally to collaborate with California businesses, their corporate counsel, law firms, ADR providers, and universities to support international arbitration and mediation in California. CalArb's broader mission is to provide resources to businesses and legal practitioners around the globe to guide them on international dispute resolution in California.

CalArb has joined with the California Lawyers Association to spearhead the first annual California International Arbitration Week, which is set to take place on March 14 – 18, 2022. California International Arbitration Week will be a hybrid, virtual and in-person conference, and presenting organizations will include: AAA-ICDR, Asian International Arbitration Centre, Arbitral Women, Chartered Institute of Arbitrators, CPR Institute for Conflict Prevention and Resolution, Hong Kong International Arbitration Centre, International Chamber of Commerce Court of Arbitration, JAMS International, Korean Commercial Arbitration Board, London Court of International Arbitration, Silicon Valley Arbitration & Mediation Center, Shenzhen Court of International Arbitration, Singapore International Arbitration Centre, Straus Institute / Pepperdine University, and the University of Southern California.

These and other California initiatives are bringing interested practitioners around the world together to celebrate the opportunities California offers.

The Strategy Forward: The US Gateway to the Pacific

In working with practitioners around the world, California practitioners are developing focused plans to move forward. There are six concrete steps required and CalArb is taking the lead:

One, Engaging the International Community: CalArb plans to engage the entire international arbitration community in a coordinated, constructive manner to demonstrate how California adds to the international equation.

California provides opportunity as both a seat for arbitrations and a hearing locale for arbitrations seated in Asia, New York, and elsewhere in the Americas. To strengthen opportunities for international arbitration on the Pacific coast, CalArb plans to collaborate with other institutions in the Americas, including NYIAC, the Vancouver International Arbitration Centre, and providers in Latin America.

As well, CalArb will be engaging new and diverse practitioners around the globe who can benefit from and contribute to the opportunities California offers.

Two, Engaging Law Firms in California: CalArb will be working to develop sustaining relationships with US and international law firms in California, including law firms that are not yet fully engaged in the international arbitration field. There are many highly capable lawyers in California who can add value to international arbitration. Many already have international backgrounds, unique industry focused practices and serve an array of international clients.

Three, Providing Education: CalArb plans to implement regular, ongoing educational programming on international arbitration and engage in focused initiatives to bring practitioners into the fold. This effort further includes supporting California law schools in teaching international arbitration.

Four, Working with Corporations: CalArb plans to enlist broad corporate support for international arbitration in California. 55 of the Fortune 500 companies are based in California, including the likes of Apple, Google, Chevron, Wells Fargo, Intel, Walt Disney Company, Netflix, Salesforce, Visa, PayPal, and Uber Technologies. California businesses need to understand the benefits of arbitration, particularly when the alternative is a foreign court. This requires active leadership from companies that are already active users of international arbitration.

Five, Enlisting Government Support: CalArb will be examining opportunities for government support and engagement. Unlike some jurisdictions that have received heavy government support for developing arbitration, California has yet to engage state and local governments in any meaningful way. Other leading jurisdictions have turned to government support for international hearing centers to accommodate international arbitration proceedings. Those facilities serve as a focal point for in-person and hybrid arbitrations and contribute greatly to the economics in their locales. California may soon be doing the same in one or more locations.

As well, CalArb is planning for ongoing outreach to the California legislature and judiciary so that they properly appreciate the value of international arbitration, and so that the topic is not lost in the national debate over employee and consumer arbitration (for more on those topics, see here). This includes responding directly to questions raised as to the statutory requirements for foreign counsel as well as continuing to update California's international arbitration law. Already, leading practitioners and academics in the state are working on a California Lawyers Association project to modernize California's UNCITRAL Model Law statute to include the latest amendments and new innovations.

Six, Collaborating with Institutions: California will be looking to find its institutional footing. All of the leading arbitral seats are closely aligned with one or more arbitral institutions that call their cities home. Although AAA-ICDR has a presence in California, none of the leading international arbitral institutions are based in California. US domestic provider JAMS, based in Southern California, has been devoting significant resources to develop international credentials by adding international arbitrators to its ranks, investing in international marketing, and building out international arbitration centers in California. Several Asia-based institutions have also been actively exploring the US market through California. It is inevitable that AAA-ICDR will increase its focus on California as the opportunity develops. Whether AAA-ICDR, JAMS, or some other existing or to be established institution fills the void remains to be seen. But in the meantime, California international practitioners will be actively encouraging institutions to make measurable, on the ground commitments to California.

California is already the US's gateway to Asia and the Pacific Rim and is thus uniquely positioned

to serve as the base for Pacific Rim-focused arbitration in the Americas. It has the resources in technology to offer unique, practical and useful solutions to parties. And that is precisely where the opportunity lies – for California to innovate what comes next in international arbitration. Because with innovation, California is at its best.

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This article represents the views of the authors and not necessarily those of the referenced entities.

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