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AB 1903: A Much-Needed Update to California's International Commercial Arbitration Landscape

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On July 15, 2024, Governor Gavin Newsom signed into law AB 1903, which makes two major updates to existing California law helping to ensure that the state remains a sought-after destination for international commercial arbitration. Specifically, it (1) expands what qualifies as a written agreement to arbitrate, and (2) expressly allows tribunals to grant interim measures of protection.

The bill, which was introduced by California Assemblyman Brian Maienschein and developed by a Working Group coordinated by the California Lawyers Association and California Arbitration ("CalArb"), updates California's International Commercial Arbitration and Conciliation Act ("CIACA"), codified as Title 9.3 of the Code of Civil Procedure, Cal. Civ. Proc. Code § 1297.11 et seq., to more closely align with the UNCITRAL Model Law.

Background

In 1988, California became the first U.S. state to adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law. In doing so, California demonstrated its commitment to international arbitration. The state's commitment has paid off—according to the International Chamber of Commerce (ICC), by 2019, California rose to become the second most utilized seat for ICC international arbitration in the United States. In turn, California's popularity as a jurisdiction for international commercial arbitration has been beneficial to the state's hospitality industry, local businesses, and legal profession.

However, despite initially being at the forefront of international arbitration in the United States, California has fallen behind.

The last major change to the California international commercial arbitration regime came in 2017 when the legislature passed SB 766, authorizing out-of-state attorneys and attorneys from foreign jurisdictions to represent parties in international arbitrations in California. Over the seven years since SB 766 passed, as some commentators have noted, California has struggled to persuade parties to hold their international arbitrations in California. Instead, parties have sought resolution in New York, London, Paris, Geneva, Singapore, Hong Kong, and even Florida.

AB 1903 finally takes a step towards further modernizing California's law governing international commercial arbitration by codifying amendments made in 2006 to the UNCITRAL Model Law, including a new Article 7 and a new chapter IV A to replace Article 17. The revised Article 7 was

intended to modernize the form required for an arbitration agreement to better meet the demands of prevailing international contract practices, and the newly introduced chapter IV A established a more comprehensive legal regime dealing with interim measures. AB 1903 adopts both changes.

Electronic Mail and Electronic Communication

Previously, Title 9.3 required an arbitration agreement to be in writing and provided that an agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another.

AB 1903 updates this definition to meet the modern business and legal reality where parties are more likely to communicate via e-mail than telex.

Section 1297.23(a) now defines an arbitration to be in writing if its content is recorded in any form, including, but not limited to, in a document signed by the parties or in an exchange of letters, telex, telegrams, electronic mail, or other means of telecommunication accessible for subsequent reference that provides a record of the agreement. The Code further clarifies that for an arbitration agreement to be considered "in writing," the electronic communication and the information contained therein must be accessible so as to be usable for subsequent reference.

Additionally, section 1297.73(b)(1) defines "electronic communication" to be any communication that the parties make by means of data messages. And Section 1297.73(b)(2) defines "data message" as "information generated, sent, received, or stored by electronic, magnetic, optical, or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy."

This language mirrors that of the Model Law. The notes to the 2006 Amendments specify that the new rule modernized the language referring to the use of electronic commerce by adopting wording inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts to better conform with international contract practices. The Recommendation was drafted in recognition of the widening use of electronic commerce.

As a consequence of AB 1903's updates to Title 9.3, practitioners in California will need to proactively preserve electronic communications containing arbitration agreements and ensure that if a dispute arises, such electronic records are easily accessible.

Interim Protective Measures

Second, AB 1903 grants superior courts the authority to enforce interim protections issued by an arbitration tribunal. In doing so, AB 1903 provides a degree of protection to the requesting party not previously formalized in Title 9.3.

Section 1297.91 achieves this by providing that a party may request from a superior court, before or during arbitral proceedings, a so-called "interim measure of protection."

Title 9.3 defines an interim measure of protection as any temporary measure by which, at any time prior to the issuance of the award, the arbitral tribunal orders a party to do any of the following: (1)

maintain or restore the status quo pending determination of the dispute; (2) take action that would prevent, or refrain from taking action that is likely to cause, current, or imminent harm or prejudice to the arbitral process itself; or (3) provide a means of preserving assets out of which a subsequent award may be satisfied; or preserve evidence that may be relevant and material to the resolution of the dispute.

In short, interim measures operate similarly to equitable remedies in a civil case in California. The party requesting interim measures must satisfy a two-part test similar to that required of injunctive relief. First, the requesting party must show harm that is not adequately reparable by an award of damages is likely to result if the measure is not ordered, and that such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted. And second, the requesting party must show a "reasonable possibility" that the requesting party will succeed on the merits of the claim.

According to analysis of AB 1903 by the Assembly Committee on Judiciary, these changes make California a more attractive location for international commercial arbitration. Although the Assembly Committee on Appropriations acknowledged that an uptick in interim measures petitions might cause a modest impact on the caseload of California's superior courts, it found that this would likely be offset by the increase in filing fees and the benefits to the state's businesses and support industries such as hospitality from an increase in international commercial arbitrations held in California.

Conclusion

AB 1903 is a much-needed update to the California's international commercial arbitration regime and is consistent with other legislative efforts that have been made to promote international commercial arbitration in the state.

Furthermore, where there is uncertainty, AB 1903 reminds parties to look towards the Model Law. Specifically, the bill directs application of Title 9.3 to include regard for its international origin and the need to promote uniformity in its application and clarifies that any questions concerning international commercial arbitration that are not expressly settled within Title 9.3 to be settled in conformity with the general principles embodied in Title 9.3. Thus, returning California's international commercial arbitration framework back to its foundational purpose.

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