Obstacles For Calif. As It Seeks Spot As Int'l Arbitration Venue

By **Ken Hagen** (July 2, 2019, 12:05 PM EDT)

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Lost among current headlines is the demolition of California's invisible statutory wall that has kept international lawyers from representing their clients in California in multimillion-dollar international arbitration disputes.The "if we build it they will come" question is whether this will result in an influx of new international arbitration cases?

Since the 1998 California Supreme Court case Birbrower v. Superior Court of Santa Clara County,[1] lawyers not licensed to practice law in California were in violation of California Business and Professions Code Section 6125 if they represented their clients in an arbitration or in a mediation. As a result, international companies and their international lawyers refrained from agreeing to arbitrate matters in California. The result was that, despite San Francisco and Los Angeles being world-class business destinations and corporate headquarters to numerous companies, California lost the opportunity to be an arbitral venue for most international disputes.

This past year, California's chief justice created the California Supreme Court international commercial arbitration working group, which was chaired by Dan Kolkey and included a group of lawyers (including Hon. Abraham Sofaer, the chairman of my firm FedArb), to draft legislation to eliminate this restriction. The result was S.B. 766,[2] which the state Legislature passed and the governor signed.

As of Jan. 1, 2019, non-California lawyers admitted to practice in another state or country can represent parties in international arbitrations in California. The working group that drove enactment of this bill has reached out to numerous law firms and ADR providers to create and promote the California International Arbitration Center, or CIAC, an organization that is similar to the bodies created in New York and other jurisdictions for the purpose of leading the effort to bring cases to those states.

While these are important first steps, and the Global Arbitration Review awarded California its award for most notable innovation in international arbitration, it would be wishful thinking to believe that S.B. 766 and the CIAC alone will be enough to attract international arbitration litigants to California. Numerous other obstacles work against making California a preferred international arbitral venue over venues such as London, Paris and Singapore, as well as New York and Florida.

First, California's Arbitration Act has detailed disclosure and other obligations for arbitrators. These provisions require arbitrators to serve detailed written conflict disclosures to the parties regarding prior engagements that might affect their impartiality. These disclosure requirements — which include somewhat attenuated matters that most arbitrators would not think are relevant — are more onerous than those required by most international venues.

While fulsome disclosures would promote the fairness of international arbitrations in California, any interpretation that requires such expansive disclosures can result in the international arbitration bar suggesting that arbitrations not be venued in California so as to

avoid submitting such broad disclosures.

Second, arbitrations venued or seated in California result in California courts deciding disputes regarding jurisdiction and arbitrability of the claim; provisional orders issued by the arbitrators for interim relief and vacatur; enforcement; and the contours of preemption of the Federal Arbitration Act over any conflicting provisions of the CAA. Establishing meaningful jurisprudence on these issues will take time.

Third, California's consumer protection laws that deem arbitration clauses as against public policy have created a perception that otherwise valid arbitration agreements in the international commercial context may somehow be invalid as contrary to public policy.

Fourth, many arbitration agreements already specify the seat of the arbitration, and even with the new law it will take time for parties to agree on designating California as the venue. In addition, the leading Pacific Rim arbitral institutions — which are written into many contracts — want to control the administration of cases using their own rules, and it will take time for them to retain suitable administrative personnel to administer cases in California.

It will take a steady march of people arbitrating their cases in California to make companies and international lawyers comfortable with California. The CIAC has responded with an impressive agenda of events to educate litigants about California. These programs are needed to offset the perceptions that serve as headwinds to the business world and legal community that currently impede California in attracting international cases.

Lawyers are naturally risk averse, and they subject themselves to scrutiny when they propose that their clients arbitrate in new venues, such as California. This risk is aggravated by such factors as the recent award by a California arbitrator of punitive damages and the headlines of billion-dollar arbitration awards by California tribunals.

This is not to say that California cannot and will not succeed as a preferred venue for international arbitrations — it is just that a substantial inflow will take more time to develop than people realize. Immediate success may be possible in areas where California is recognized as the preeminent source of legal expertise, such as intellectual property litigation.

Silicon Valley is recognized as having the best intellectual property lawyers and judges in the U.S., or, for that matter, the world. Lawyers and technology companies around the world are comfortable with American intellectual property jurisprudence and trust the judges who adjudicate these matters because they understand the complex issues associated with highly technical areas of technology. They also are keenly aware of the need to carefully craft reasoned orders that deal with the specific issues before them.

Additionally, many technology companies in Silicon Valley and Southern California have the economic bargaining power to insist that their contractual disputes be resolved in California arbitrations. Some companies will be wary of arbitrating their disputes in the backyard of U.S. technology companies. Many lawyers have convinced their clients to arbitrate in California, however, given that they are specialists with deep experience in their fields.

Removing the statutory wall that deterred California-based arbitrations may be enough to start a meaningful influx of international litigants. However, to increase this inflow, California should play to its strength and trumpet specific areas of international arbitration where it provides unquestioned advantages and then use these success stories to prove to

the international business community that it can provide a safe and effective home to all types of disputes in international arbitration.

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Disclosure: Abraham Sofaer, the chairman of FedArb, was part of the California Supreme Court international commercial arbitration working group, which was assembled to draft legislation to allow attorneys not admitted in California to represent clients in international arbitration in California. The legislation, S.B. 766, was enacted last year.

[1] Birbrower, Montalbano, Condon & Frank v. Superior Court, 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998).

[2] CCP 1297.185 et seq.