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California Opens The Door To International Arbitration

By **Sarah Reynolds, Soledad O'Donnell and Hannah Banks**
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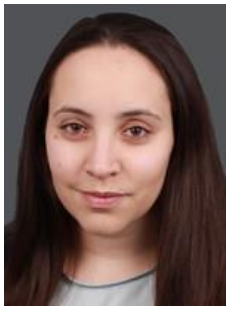

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On July 18, 2018, California passed a new law clarifying that lawyers who are not members of the California bar may appear in international arbitrations seated in California without local counsel. SB 766, which was signed into law by Gov. Jerry Brown after being passed by the state assembly on July 9, 2018, is part of the state's effort to increase its visibility as a center for international arbitration.

Prior to the passage of SB 766, foreign lawyers were required to engage local co-counsel to appear in international arbitrations seated in the stat,e because of uncertainty created by a 1998 California Supreme Court decision. In Birbrower v. Superior Court of Santa Clara County,[1] the court ruled that a New York law firm had engaged in the unauthorized practice of law through various activities in the state, including arbitration-related activities, such as meeting with the client in California to give recommendations and advice, filing a demand for arbitration with the American Arbitration Association's San Francisco office, interviewing potential arbitrators and advising its client on settlement. The matter ultimately never proceeded to arbitration.

In finding that the attorney had engaged engaged in the unauthorized practice of law in California, the court declined to create an exception for the arbitration-related activity. Specifically, the court stated:

We decline Birbrower's invitation to craft an arbitration exception to section 6125's prohibition of the unlicensed practice of law in this state. Any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law. ... Section 6125, however, articulates a strong public policy favoring the practice of law in California by licensed State Bar members. In the face of the Legislature's silence, we will not create an arbitration exception under the facts presented.

The requirement for local co-counsel even in international arbitrations has prevented California's major cities from becoming U.S. international arbitration hubs along the lines of New York City, Miami and Houston, which are all in states that place no restrictions on out-of-state lawyers engaged in international arbitrations.

SB 766 provides that foreign attorneys are "qualified" for purposes of international arbitration if they are (1) admitted to practice law in a state or territory of the United States, or a member of a recognized legal profession in a foreign jurisdiction; (2) "[s]ubject to effective regulation and discipline by a duly constituted professional body or public authority of that jurisdiction"; and (3) in good standing in every jurisdiction in which they are admitted or authorized to practice.

A "qualified attorney" may "provide legal services in an international commercial arbitration or related conciliation, mediation, or alternative dispute resolution proceeding" if one of the following conditions is satisfied:

- The services are undertaken in association with a lawyer who is admitted to practice in California and who actively participates in the matter;
- The services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;
- The services are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is admitted or otherwise authorized to practice;
- The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is admitted or otherwise authorized to practice; or
- The services arise out of a dispute governed primarily by international law or the law of a foreign or out-of-state jurisdiction.

This law, which flew through the state's legislature, closes a significant gap in California state law, which is otherwise generally arbitration-friendly. With the local co-counsel requirement and the associated added cost removed, California will be a more viable option for those who, given all other relevant factors, would consider California as an arbitral seat.

Although California's new law still maintains some restrictions on the participation of out-of-state and foreign counsel, it is a big step forward, bringing the state closer to other pro-arbitration states that do not place restrictions on out-of-state lawyers. As a result, over time, we expect San Francisco and Los Angeles to see an increase in international arbitrations — particularly given their ideal locations with respect to the Pacific Rim and Latin America.

This law not only benefits those who wish to arbitrate their disputes in California, but is sure to be a benefit to the state itself. In addition to California's generally arbitration-friendly laws, the state's large economy and infrastructure make it an appealing place to seat and hold an arbitration. The international

arbitration industry has already taken note of this expected development and, in anticipation of the law's passage, JAMS, a large provider of mediation and arbitration services, announced that it plans to open an arbitration center in Los Angeles. JAMS may be the first arbitration services provider to announce plans to expand in California, but given the new law, it likely will not be the last.

It should be noted that California is not the only state to have laws that discourage arbitration. Many other states make arbitration difficult, although not always through restrictions on counsel. For example, Nevada's laws make it difficult to enforce an arbitration clause unless there is "specific authorization" indicating that a person or company has affirmatively assented to the arbitration provision itself, often through a separate agreement or through emphasizing the arbitration clause using bold print or capital letters. Nevada has even held that initialing every page of an agreement was not sufficient to meet the "specific authorization" requirement. Montana has similarly refused to enforce an arbitration agreement where the agreement was not in underlined capital letters on the first page of the agreement. Although these restrictions do not limit the participation of counsel, as the prior California law did, they underline the importance of choosing an arbitral seat that is arbitration-friendly.

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[1] Birbrower v. Superior Court of Santa Clara County , 949 P.2d 1 (Cal. 1998).