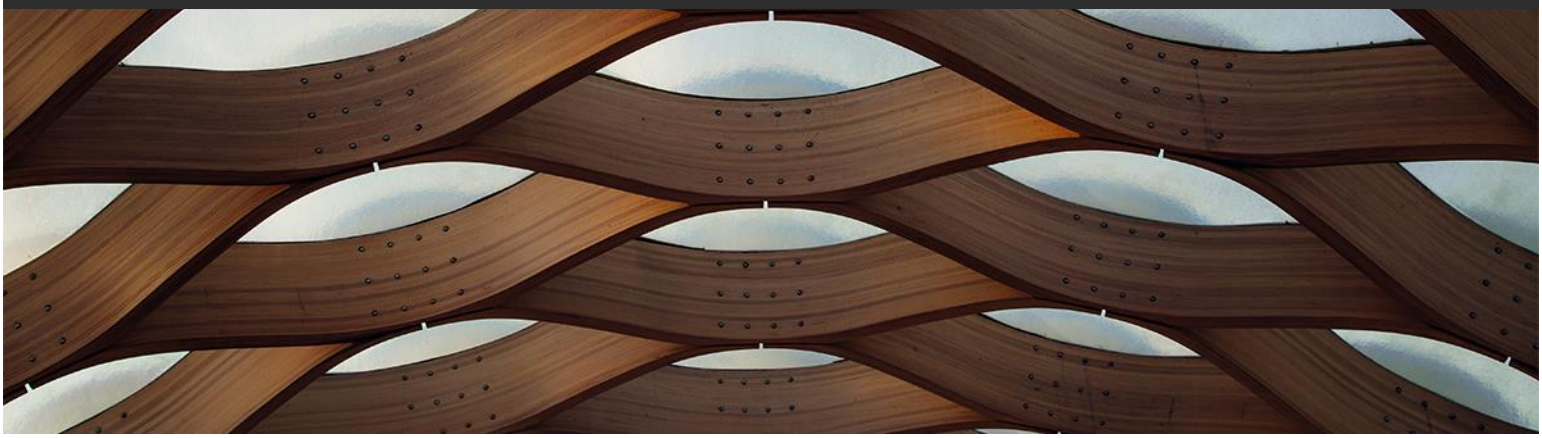
GT GreenbergTraurig

Alert | International Litigation & Dispute Resolution



July 2018

California Looks to Attract International Arbitrations by Removing Restrictions on Foreign Lawyers

California is not known as a popular jurisdiction for international arbitration. A study group commissioned in 2017 by the California Supreme Court concluded that there was a simple reason for this – California law was scaring foreign practitioners away.

The specific problem was a 1998 California Supreme Court case[1] holding that non-California lawyers violated the California Business and Professions Code if they participated in arbitrations in the state. Violators of the code could even be subject to criminal penalties.

This restriction was later removed for attorneys licensed in other U.S. states or territories. However, the bar on foreign lawyers participating in arbitrations in California was seen as enough to keep California out of the multi-billion-dollar international arbitration business.

Legislation passed last week in California, SB 766, is seeking to increase California's appeal as a destination for international arbitrations. If, as expected, Governor Brown signs the measure into law, any "qualified attorney" will be able to act in an international arbitration in California provided the services rendered by that attorney have a sufficient nexus to the lawyer's home jurisdiction or the lawyer is associated with a California lawyer. Many lawyers from foreign jurisdictions would likely meet the test of

[1] *Birbrower v. Superior Court of Santa Clara County*.

"qualified attorney" under SB 766. Most international disputes are also likely to have the requisite nexus for the qualified attorney to represent their clients in international arbitrations in California.

The Lucrative Business of International Disputes

International arbitration is one of the fastest growing fields within the legal industry. Ninety-two percent of in-house lawyers responding to a 2018 Queen Mary University of London survey stated that international arbitration is their preferred mechanism for resolving cross-border disputes.[2] The major international arbitration institutions have largely seen steady upward trends in the number of cases filed over the past five years and new arbitration centers and institutions are ramping up their efforts to try to obtain market share in the booming business of dispute resolution.

Legal jurisdictions are likewise competing to share in the economic benefit that comes from being the host jurisdiction for these private legal proceedings. Within the past five years, the list of countries that have made or have announced they will make some pro-arbitration reforms to their legal systems includes: India, Saudi Arabia, Russia, the United Arab Emirates, Ukraine, Myanmar, South Africa, and Japan (among others). These reforms, like the one in California, have a singular goal, attract more international arbitration to the jurisdiction.

The Text of SB 766

SB 766 is straightforward. It permits non-U.S. lawyers to be considered "qualified" for the purpose of international arbitration if they are:

> *(a) … a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys or counselors at law or the equivalent.*
>
> *(b) Subject to effective regulation and discipline by a duly constituted professional body or public authority of that jurisdiction.*
>
> *(c) In good standing in every jurisdiction in which he or she is admitted or otherwise authorized to practice.*

A qualified lawyer may participate in an international arbitration provided <u>any</u> of the following criteria are met regarding the services rendered:

1. *The services are undertaken in association with an attorney who is admitted to practice in this state and who actively participates in the matter.*
2. *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.*
3. *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.*

[2] The report of the survey results can be downloaded at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF

4. *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.*

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

Choosing the Seat of Arbitration: A Case for California

The seat of the arbitration, which does not have to be the same as the physical location of the hearing, matters because it establishes the national arbitration law that will govern the recognition and enforcement of agreements to arbitrate and arbitral awards. The same Queen Mary University of London survey referenced above found that parties choose the seat of arbitration based on a variety of factors including (1) the reputation of the forum, (2) users' perception as to the quality of the legal infrastructure, including its reputation for neutrality and impartiality, (3) the characteristics of the national arbitration law, and (4) a track record for enforcing arbitration awards and agreements to arbitrate. Visa requirements and relative ease of witnesses being able to freely travel to the location of the arbitration, access to infrastructure, facilities, and support resources are also factors for choosing a jurisdiction as the seat of arbitration. These latter factors come into play because the "seat" of arbitration often also becomes the physical location where the proceedings will be held.

California checks almost every box as a location to select as the seat of international disputes. It has strong national and state laws that favor the recognition and enforcement of arbitral awards and agreements to arbitrate. California has sophisticated state and federal courts that don't have a reputation for regional bias and California has many world-class cities and transportation centers that can offer suitable access, facilities and resources to host international disputes.

Whether California becomes an international arbitration hub remains to be seen. However, signing SB 766 into law is an important first step in putting California on the international arbitration map.

Authors

This GT Alert was prepared by **Jeff E. Scott**, **Robert J. Herrington** and **Thomas G. Allen**. Questions about this information can be directed to:

- Jeff E. Scott | +1 310.586.7715 | scottj@gtlaw.com
- Robert J. Herrington | +1 310.586.7816 | herringtonr@gtlaw.com
- Thomas G. Allen | +1 202.331.3139 | allentg@gtlaw.com
- Or your Greenberg Traurig attorney