SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1903 (Maienschein)
Version: January 23, 2024
Hearing Date: June 4, 2024
Fiscal: Yes
Urgency: No
AM

SUBJECT

International commercial arbitration: procedure

DIGEST

This bill specifies that an agreement is in writing for purposes of the statutory framework for the arbitration and conciliation of international commercial disputes if it is contained in an exchange of electronic mail or in an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference. The bill also makes various changes to provisions governing an interim measure of protection that is authorized to be issued under the framework.

EXECUTIVE SUMMARY

This bill is identical to AB 615 (Maienschein, 2023), which passed this Committee but was ultimately held in the Senate Appropriations Committee. In 1985, the United Nations Commission on International Trade Law adopted a model law on International Commercial Arbitration (UNCITRAL model law) to provide a framework for the resolution of commercial disputes involving multiple nations from varying legal traditions. Three years later, with the passage of AB 2667 (Killea, Ch. 23, Stats. 1988), California enacted specific statutes governing the arbitration and conciliation of international commercial disputes according to the standards of that UNCITRAL model law. In 2006, amendments were made to update the UNCITRAL model law in order to conform it to current practices and account for technological developments. This bill incorporates the amendments to the UNCITRAL Model Law that were made in 2006 into California law.

The bill is sponsored by the International Law and Immigration Section, and the Litigation Section of the California Lawyers Association. The bill is supported by various organizations representing arbitrators. No timely opposition was received by the Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Governs the arbitration and conciliation of international commercial disputes, if the arbitration or conciliation is in California, subject to any agreement which is in force between the United States and any other state(s) under Title 9.3 of the Code of Civil Procedure ("Title 9.3"). (Code Civ. Proc. § 1297.11 et seq.)[1]

2) Existing law specifies the circumstances under which an arbitration or conciliation agreement is considered "international" under Title 9.3. (§ 1297.13.)

3) Requires an arbitration agreement under Title 9.3 to be in writing.
    a) Provides 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 this 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. (§ 1297.72.)

4) Provides that it is not incompatible with an arbitration agreement under Title 9.3 for a party to request from a superior court, before or during arbitral proceedings, an interim measure of protection, or for the court to grant such a measure. (§ 1297.91.)

5) Authorizes the arbitral tribunal, at the request of a party, to order a party to take an interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, unless otherwise agreed by the parties. (§ 1297.171.)

6) Authorizes the arbitral tribunal to require a party to provide appropriate security in connection with an interim measure of protection. (§ 1297.172.)

This bill:

1) Directs application of the title to include regard for its international origin and the need to promote uniformity in its application and the observance of good faith.

2) Clarifies that any questions concerning international commercial arbitration that are not expressly settled within Title 9.3 are to be settled in conformity with the general principles embodied in the title.

3) Defines an arbitration agreement 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

[1] All further references are to the Code of Civil Procedure unless specified otherwise.

telecommunication accessible for subsequent reference that provides a record of the agreement.
   a) Further clarifies that an arbitration agreement is in writing if it is an electronic communication and the information contained therein is accessible so as to be usable for subsequent reference.
   b) Defines the following for the purposes of the previous provisions:
      i) "Electronic communication" means any communication that the parties make by means of data messages.
      ii) "Data message" means 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.

4) Defines as an agreement in writing, an agreement that is contained 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 the other, and a reference in a contract to any document containing an arbitration clause if the reference is such as to make that clause part of the contract.

5) Grants a superior court the same power to issue an interim measure of protection in relation to arbitration proceedings, irrespective of whether the place of arbitration is in California, as it has in relation to proceedings filed in the first instance in the superior courts.

6) Clarifies that any party to the arbitration may request the superior court to enforce an interim measure of protection granted by an arbitral tribunal, and removes a requirement that the enforcement be granted pursuant to the law applicable to the granting of the type of interim relief requested.

7) Defines an interim measure of protection, or interim measure, as any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to do any of the following:
   a) maintain or restore the status quo pending determination of the dispute;
   b) 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;
   c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
   d) preserve evidence that may be relevant and material to the resolution of the dispute.

8) Requires a party requesting an interim measure to satisfy the arbitral tribunal that both of the following conditions are met:
   a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and 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

b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination of this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

9) Permits a party, without notice to any other party, to make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested, and would allow the arbitral tribunal to grant a preliminary order provided that it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

10) Requires the arbitral tribunal, immediately following their determination with respect to an application for a preliminary order, to give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including the content of any oral communication, between any party and the arbitral tribunal in relation to the interim measure.

11) Requires the arbitral tribunal to provide an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time, and decide promptly on any objection to the preliminary order.

12) Establishes that a preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal, and allows the arbitral tribunal to issue an interim measure adopting or modifying the preliminary order after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

13) Makes a preliminary order binding on the parties, but not subject to enforcement by a court, and clarifies that the preliminary order does not constitute an award.

14) Permits the arbitral tribunal to modify, suspend, or terminate an interim measure or a preliminary order it has granted, or in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

15) Permits the arbitral tribunal to require the party requesting an interim measure to provide appropriate security in connection with the measure, as well as require the party applying for a preliminary order to provide security in connection with the order when appropriate.

16) Permits the arbitral tribunal to require any party to promptly disclose any material change in the circumstances on the basis of which the measure was requested or granted.

17) Requires the party applying for a preliminary order to disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and continues the obligation until the party against whom the order has been requested has had an opportunity to represent its case.

18) Makes the party requesting an interim measure or applying for a preliminary order liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or orders should not have been granted. Permits the arbitral tribunal to award such costs and damages at any point during the proceedings.

19) Makes an interim measure issued by an arbitral tribunal final and binding, and, unless otherwise provided by the arbitral tribunal, permits the interim measure to be enforced upon application to the superior court subject to other provisions of this bill.
    a) Requires the party who is seeking or has obtained recognition or enforcement of an interim measure to promptly inform the court of any termination, suspension, or modification of the interim measure.
    b) Provides the superior court where recognition or enforcement is sought may order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

20) Specifies that recognition or enforcement of an interim measure can be refused only if the provisions of a) or b), below, are met.
    a) At the request of the party against whom it is invoked if the court is satisfied that certain conditions are met. Provides that any determination made by the court on any of these grounds is effective only for the purposes of the application to recognize and enforce the interim measure. The court in which recognition or enforcement is sought cannot, in making that determination, undertake a review of the substance of the interim measure.
    b) If the court finds that any of the following are met:
        i) the interim measure is incompatible with the powers conferred upon the court, unless the court decides to reformulate the interim measure to the extent necessary to adapt the interim measure to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance;
        ii) the subject matter of the dispute is not capable of settlement by arbitration under the law of the United States; or
        iii) the recognition or enforcement of the interim measure would be contrary to the public policy of the United States.

21) Makes various technical and clarifying amendments.

COMMENTS

1. Stated need for the bill

The author writes:

> California's international commercial arbitration code is based on the 1985 UNCITRAL Model International Commercial Arbitration Law. This bill incorporates the amendments to the UNCITRAL Model Law that occurred in 2006, which updated the Model Law to conform to current practice and account for technological developments.
>
> This legislation is entirely consistent with the other legislative efforts that have been made to promote California as a venue for international commercial arbitration – efforts that were made to encourage that such arbitrations be held in California and not elsewhere in, or outside, the United States to the detriment of California companies. When held in California, international arbitrations benefit California businesses, which otherwise would have to litigate across the country or overseas, and support the industries, including the hospitality industry, that benefit from business activity in this State.

2. Bill is intended to bolster California as a venue for international commercial arbitration

In 1985, the United Nations Commission on International Trade Law adopted a model law on International Commercial Arbitration (UNCITRAL model law) to provide a framework for the resolution of commercial disputes involving multiple nations from varying legal traditions. Three years later, with the passage of AB 2667 (Killea, Ch. 23, Stats. 1988), California enacted specific statutes governing the arbitration and conciliation of international commercial disputes according to the standards of that UNCITRAL model law. As described in this Committee's analysis of AB 2667, the legislation sought "to permit the arbitration [and conciliation] of international commercial disputes in California according to accepted international standards, thereby rendering foreign nationals more amenable to negotiating their disputes in this State." (See Sen. Judiciary Com., analysis of AB 2667 (1987-1988 reg. sess.) p. 2.)

Located at Title 9.3 of the Code of Civil Procedure ("Title 9.3"), these statutes specify the form of the arbitration agreement, delineate judicial involvement in aid of arbitration, provide for the composition and jurisdiction of arbitral tribunals, establish the manner and conduct of arbitrations, govern the making of awards and termination of proceedings, and specify the conduct and effect of conciliation procedures. In 2018, Title 9.3 was amended to authorize foreign and out-of-state attorneys who meet certain conditions to represent their clients in an international arbitration in this state. (SB 766 (Monning, Ch. 134, Stats. 2018).) Other than SB 766, Title 9.3 has not been updated since it was enacted.

In 2006, amendments were made to update the UNCITRAL Model Law in order to conform it to current practices and account for technological developments. These amendments addressed, among other things, the right to interim relief while the international arbitration proceeded, and modernized the law in light of technological developments, principally to clarify that an international arbitration agreement can be formed through an exchange of emails or other electronic communications.

According to the proponents of the bill, California's outdated statute acts as a barrier to attracting international commercial arbitrations to the state. They argue this bill is entirely consistent with other legislative efforts that have been made to promote California as a venue for international commercial arbitration. They note that when these arbitrations are held in California, it benefits California businesses, which otherwise would have to litigate across the country or overseas, and supports the industries, including the hospitality industry, that benefit from business activity in this state.

3. Statements in support

The California Dispute Resolution Council writes in support stating:

> AB 1903 is designed to bring the California International Arbitration and Conciliation Act (CIAC), codified as Code of Civil Procedure Section 1297.11 et. seq., into conformance with the current version of the Model Law on International Commercial Arbitration (the Model Act) that was adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. […]
>
> AB1903 will have virtually no impact or burden on our state courts. We expect that most of the litigation arising from international arbitration agreements will quite likely be initially filed or removed to the federal courts because of the geographical diversity that is inherent in international arbitrations.
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> AB 1903 will once again make California an attractive location for international arbitrations. It needs to be enacted.

SUPPORT

International Law and Immigration Section, California Lawyer Association (sponsor)
Litigation Section, California Lawyers Association (sponsor)
California Dispute Resolution Council
Silicon Valley Arbitration and Mediation Center, Inc.

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 615 (Maienschein, 2023) was identical to this bill. AB 615 was held in the Senate Appropriations Committee.

SB 766 (Monning, Ch. 134, Stats. 2018) authorized foreign and out-of-state attorneys who meet certain conditions to represent their clients in an international arbitration in this state.

AB 2667 (Killea, Ch. 23, Stats. 1988) enacted Title 9.3.

PRIOR VOTES

Assembly Floor (Ayes 70, Noes 0)
Assembly Appropriations Committee (Ayes 12, Noes 0)
Assembly Judiciary Committee (Ayes 10, Noes 0)

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