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## **California Must Be Specified in Venue and Choice of Law Employment Contract Provisions**

*Chris Micheli\**

The California Legislature considered a number of arbitration-related bills during its 2016 Legislative Session.<sup>1</sup> Despite targeting arbitration,<sup>2</sup> the main bill that was enacted actually affects all contracts, including those involving arbitration, and it specifies California as the venue and choice of law only in employment contracts.<sup>3</sup> Despite the relatively straight-forward nature of this bill, the enacted measure raises a number of questions for employers and practitioners.

Senate Bill 1241,<sup>4</sup> authored by State Senator Bob Wieckowski (D-Fremont), was the subject of significant debate and lobbying in the California Legislature for much of the 2016 Session.<sup>5</sup> The bill pitted traditional antagonists against each other. From the outset, the bill sought “to ensure that California consumers and employees cannot be forced to litigate or arbitrate their California-based claims outside of California, under out-of-state laws, as a condition of a consumer or employment contract.”<sup>6</sup> Ultimately, the bill was narrowed to apply only to employment contracts and not consumer agreements.<sup>7</sup>

As explained in the Senate Bill analyses of SB 1241:

On March 1, 2016, the Senate Judiciary Committee held an informational hearing on the topic of private or contractual arbitration agreements, entitled ‘The Federal Arbitration Act, the U.S. Supreme Court, and the Impact of Mandatory Arbitration on California Consumers and Employees.’ In that hearing, many issues facing consumers and employees who are subject to arbitration clauses contained in

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1. *See, e.g.*, SB 1007, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (enacted); SB 1065, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (enacted); SB 1078, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Apr. 4, 2016, but not enacted); ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2879, at 3, 5 (Apr. 19, 2016).

2. *See, e.g.*, SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1241, at 4 (April 26, 2016).

3. SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (enacted).

4. *Id.* (The bill was signed into law on September 25, 2016).

5. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1241, at 1–3 (Apr. 26, 2016).

6. *See, e.g., id.* at 2.

7. *See* SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (enacted).

standardized, take-it-or-leave-it, or ‘adhesive,’ contracts were brought to light.<sup>8</sup>

As a result of that hearing, four bills were introduced in the State Senate dealing with arbitration.<sup>9</sup>

### I. EXISTING STATE LAW

In general, California law allows state courts to exercise jurisdiction on any basis that is consistent with the state or federal Constitutions.<sup>10</sup> A state court is also authorized to stay or dismiss most actions in which it finds “that in the interest of substantial justice” the action should be heard in a forum outside of California.<sup>11</sup>

In addition, existing state law provides that, if a court finds as a matter of law that a contract or any clause of the contract was unconscionable at the time it was made, the court may refuse to enforce the contract or the unconscionable clause.<sup>12</sup> The main case in California addressing the issue of unconscionability was a decision of the California Supreme Court.<sup>13</sup>

In the *Armendariz et al. v. Foundation Health Psychcare Services, Inc.*, decision, California’s high court struck down a mandatory arbitration agreement in an employment contract as an unconscionable contract of adhesion holding that “unconscionability has both a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.”<sup>14</sup>

Under existing California law, forum selection clauses are generally valid and enforceable unless the contesting party meets the “heavy burden” of proving that enforcing the clause would be unreasonable under the circumstances of a case.<sup>15</sup> As explained in the Assembly Floor Analysis of SB 1241, “In other words, a consumer or an employee seeking to invalidate an unfair forum selection clause must show that adjudicating in another state, or following the laws of another forum would be unreasonable.”<sup>16</sup>

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8. See SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1241, at 5 (May 12, 2016).

9. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1241, at 4 (May 12, 2016) (“A package of arbitration bills, of which this bill is one, arose out of the hearing, seeking to address various fairness issues surrounding the rules that govern the conduct and operation of arbitrators and arbitrations in this state.”).

10. CAL. CIV. PROC. CODE § 410.10.

11. CAL. CIV. PROC. CODE § 410.30(a).

12. CAL. CIV. PROC. CODE § 1670.5.

13. *Armendariz et al. v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

14. *Id.* at 114.

15. *Bancomer v. Superior Court*, 44 Cal. App. 4th 1450, 1457 (1996).

16. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1241, at 6 (Aug. 19, 2016).

A California appellate court has also refused to enforce a forum selection clause in a consumer contract.<sup>17</sup> The court ruled that forum selection clauses will be enforced only “so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement.”<sup>18</sup> Moreover, “California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state’s public policy.”<sup>19</sup>

There have been other instances of California appeals courts<sup>20</sup> refusing to enforce a forum designation clause in an employment dispute, such as the *Verdugo v. Alliantgroup, L.P.* case,<sup>21</sup> which held that the employer could not demonstrate that enforcement would not diminish the employee’s rights if litigated in Texas courts.<sup>22</sup> Nonetheless, the author of SB 1241 argued that there have been other instances<sup>23</sup> where courts have enforced choice-of-law and forum selection provisions in employment contracts.<sup>24</sup>

Finally, there are several instances in California law that make certain other employment contract provisions, such as non-compete clauses, void or voidable as against public policy.<sup>25</sup> Legislation has previously been enacted in California to address contracts that contain choice of law or choice of venue provisions.<sup>26</sup>

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17. *America Online, Inc. v. The Superior Court of Alameda County*, 90 Cal. App. 4th 1, 21, 23 (2001).

18. *Id.* at 12.

19. *Id.*

20. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972) (Specifically, a court may invalidate a provision if the inconvenience of the forum is so grave that it effectively deprives litigants of their day in court); *Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906, 915–16, 920 (2001) (Additionally, a court may refuse to enforce a choice of law if another state’s laws fundamentally conflict with the public policy of California); see *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459, 464–65 (1992).

21. *Verdugo v. Alliantgroup, L.P.*, 237 Cal.App.4th 141 (2015).

22. *Id.* at 162.

23. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1241, at 5–6 (May 12, 2016) (Note that these are federal court decisions, which will not be impacted by California state law changes).

24. The bill’s author cited the following examples: *Hopkinson v. Lotus Dev. Corp.*, 1995 U.S. Dist. Lexis 8804 (N.D. Cal. June 21, 1995) (requiring California employees to litigate age discrimination and other claims in Massachusetts); *Flake v. Medline Indus., Inc.*, 882 F. Supp. 947 (E.D. Cal. 1995) (requiring California employee to litigate age discrimination claims in Illinois); *Sarmiento v. BMG Entm’t*, 326 F. Supp. 2d 1108 (C.D. Cal. 2003) (requiring California employee to litigate breach of contract and wage claims in New York); *Spradlin v. Lear Siegler Management Services*, 926 F.2d 865 (9th Cir. 1991) (requiring a California citizen to litigate his age discrimination claims in Saudi Arabia).

25. See, e.g., CAL. CIV. PROC. CODE §§ 1670.8, 1799.207; CAL. BUS. & PROF. CODE § 16600; *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008), *Fillpoint, LLC v. Maas*, 208 Cal. App. 4th 1170, 1182–83 (2012).

26. See AB 2781, 2006 Leg., 2005–2006 Sess. (Cal. 2006) (enacted) (child support collection choice of law agreements); AB 268, 2001 Leg., 2001–2002 Sess. (Cal. 2001) (enacted) (sale of structured settlements received in tort claims choice of law); SB 568, 1997 Leg., 1997–1998 Sess. (Cal. 1997) (enacted) (Uniform Interstate Family Support Act choice of law), AB 1051, 1991 Leg., 1991–1992 Sess. (Cal. 1991) (enacted) (construction subcontracts cannot be litigated or arbitrated outside this state).

As noted by the Legislature when SB 1241 was enacted,

Such protective statutes have been enacted in other areas, such as in construction cases, and in regulating private child support collections. Specifically, existing law<sup>27</sup> provides with respect to a contract between a contractor and a subcontractor for the construction of a public work of improvement in California that a provision shall be void and unenforceable if it purports to require any dispute between the parties to be litigated, arbitrated, or otherwise determined outside this state, or purports to preclude a party from commencing such a proceeding or obtaining a judgment or other resolution in this state or the courts of this state.<sup>28</sup>

## II. PRIOR LEGISLATION

Prior to the enactment of SB 1241, several bills purporting to do the same thing were passed by the Legislature, but ultimately vetoed by two governors.<sup>29</sup> Specifically, there were three previous instances of bills that attempted to limit choice of law or choice of forum provisions in employment contracts in the California Legislature.<sup>30</sup>

The most recent attempt was made in 2011 by AB 267 (Swanson).<sup>31</sup> In vetoing AB 267, Governor Brown stated:

This measure would prohibit employment contracts that require California employees to agree to the use of legal forums and laws of other states.

Current law prohibits California employees from being subjected to laws or forums that substantially diminish their rights under our laws, and I have not seen convincing evidence that these protections are insufficient to protect employees in California.

Finally, I would note that imposing this burden could deter out of state companies from hiring Californians—something we can ill afford at this time of high unemployment.<sup>32</sup>

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27. CAL. CIV. PROC. CODE § 410.42.

28. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1241, at 8 (Apr. 26, 2016).

29. See AB 267, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as enrolled on Sept. 8, 2011, but not enacted); AB 335, 2009 Leg., 2009–2010 Sess. (Cal. 2009) (as enrolled on Sept. 11, 2009, but not enacted); AB 1043, 2007 Leg., 2007–2008 Sess. (Cal. 2007) (as enrolled on Sept. 7, 2007, but not enacted).

30. See AB 267, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as enrolled on Sept. 8, 2011, but not enacted); AB 335, 2009 Leg., 2009–2010 Sess. (Cal. 2009) (as enrolled on Sept. 11, 2009, but not enacted); AB 1043, 2007 Leg., 2007–2008 Sess. (Cal. 2007) (as enrolled on Sept. 7, 2007, but not enacted).

31. See AB 267, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as enrolled Sept. 8, 2011, but not enacted).

An earlier bill that was similar to SB 1241 was AB 335 (Fuentes), which was passed in 2009.<sup>33</sup> However, that bill was vetoed by Governor Arnold Schwarzenegger. In his veto message, he stated:

This bill is similar to AB 1043 (Swanson, 2007), which I also vetoed. Like AB 1043, this bill would discourage out-of-state and multinational employers from hiring California-based workers and potentially contribute toward the growing problem of unemployment. Additionally, the bill is unnecessary because courts are already well equipped to determine when a choice of law or choice of forum provision in a private contract should be enforced in consideration of all applicable circumstances.<sup>34</sup>

The first bill on this topic was substantially similar to SB 1241, which was AB 1043 (Swanson) in 2007.<sup>35</sup> In vetoing AB 1043, Governor Schwarzenegger stated:

This bill appears to create a solution in search of a problem. California law currently ensures that employees can not [sic] be subjected to unconscionable contract provisions that would force them to forego the protections of California law or litigate their claims in an inappropriate out-of-state forum.

Moreover, this bill creates unnecessary and unhelpful uncertainties for the employers and employees concerning issues of federal preemption. Lastly, I strongly support the right of parties to freely contract for the terms of their employment relationship. This bill fundamentally conflicts with that policy.<sup>36</sup>

### III. EARLIER VERSIONS OF SB 1241

SB 1241<sup>37</sup> was introduced on February 18, 2016, as a so-called “spot bill.”<sup>38</sup> It was amended substantively for the first time on March 29, 2016, in the

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32. Veto Message of AB 267 from Edmund Brown, Governor, Cal. State, to State Assembly (Oct. 9, 2011) (on file with *The University of the Pacific Law Review*); State Unemployment Rates, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 2016), available at <http://www.ncsl.org/research/labor-and-employment/state-unemployment-update.aspx> (on file with *The University of the Pacific Law Review*).

33. See AB 335, 2009 Leg., 2009–2010 Sess. (Cal. 2009) (as enrolled on Sept. 11, 2009, but not enacted).

34. See Veto Message of AB 335 from Arnold Schwarzenegger, Governor, Cal. State, to Cal. State Assembly (Oct. 11, 2009) (on file with *The University of the Pacific Law Review*).

35. See AB 1043, 2007 Leg., 2007–2008 Sess. (Cal. 2007) (as enrolled on Sept. 7, 2007, but not enacted).

36. See Veto Message of AB 1043 from Arnold Schwarzenegger, Governor, Cal. State, to Cal. State Assembly (Oct. 13, 2007) (on file with *The University of the Pacific Law Review*).

37. See SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (proposing SB 1241 to amend Section 1286.2 of the Code of Civil Procedure by making a technical, non-substantive change to that provision of law).

38. A spot bill makes a technical, non-substantive change in the law as a placeholder for a later bill.

Senate.<sup>39</sup> That version proposed to amend existing law, the Consumer Contract Awareness Act,<sup>40</sup> by providing that a provision in a consumer contract that purports to designate the venue in which a controversy arising from the consumer contract is litigated, or the choice of law to be applied, is voidable by the consumer, with respect to a controversy arising in California, if the provision would deprive the consumer of the protection of California law or require the consumer to litigate the controversy out of state.<sup>41</sup>

On April 18, 2016, the bill was amended again in the Senate to add proposed Section 925<sup>42</sup> and be prospective in its application.<sup>43</sup> In addition, the bill added new sections to prohibit a seller from requiring a consumer to agree to these voidable provisions as a condition of entering into a contract, and provide that such provisions, if required, are inoperative and California law applies in its place.<sup>44</sup> Moreover, the bill was amended to specify that injunctive relief is available in this context and that a court may award a plaintiff reasonable attorney's fees.<sup>45</sup> And the bill would include arbitration with litigation for purposes of these provisions.<sup>46</sup> Finally, it was amended to create an analogous set of rights, prohibitions, and requirements, as described above, in connection with employment contracts.<sup>47</sup>

On June 14, 2016, the bill was amended in the Assembly for the first time.<sup>48</sup> The only change that was made was to except from these provisions a contract with an employee who is represented by legal counsel.<sup>49</sup> Shortly thereafter, the bill was amended again in the Assembly on June 20, 2016, wherein the bill was re-written, but little was changed substantively.<sup>50</sup>

The bill was not amended again until August 19, 2016.<sup>51</sup> At that time, the Assembly amendments limited the bill to a consumer who primarily resides in California, or to an employee who primarily resides in California.<sup>52</sup> In addition, the bill was amended to add a clause that this section shall not apply to a contract for which the employee was represented by a talent agency.<sup>53</sup>

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39. *Id.*

40. CAL. CIV. CODE § 1799.200.

41. *See* SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Mar. 29, 2016).

42. SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Apr. 18, 2016) (proposing a new section of the Lab. Code).

43. *Id.*

44. *Id.*

45. *Id.*

46. SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Apr. 18, 2016).

47. *Id.*

48. SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Jun. 14, 2016).

49. *See Id.*

50. *See* SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Jun. 20, 2016).

51. SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Aug. 19, 2016).

52. *Id.*

53. CAL. LAB. CODE § 1700.4 (defining “talent agency”).

The final amendments made to the bill in the Assembly occurred on August 29, 2016.<sup>54</sup> In this final version, the consumer contract portion of the bill was eliminated.<sup>55</sup> In addition, the bill was narrowed to apply to employment contracts involving those who primarily reside and work in California, and the exception for an employee represented by a talent agent was eliminated.<sup>56</sup>

The bill returned to the Senate for a concurrence vote where that house approved Assembly amendments that had “[narrowed] the bill by limiting its protections to employment contracts and adding an exemption for employees individually represented by legal counsel.”<sup>57</sup> The bill was enrolled and sent to the Governor for final action on September 7, 2016.<sup>58</sup> SB 1241 was chaptered on September 25, 2016.<sup>59</sup>

#### IV. PROVISIONS OF THE NEW LAW

SB 1241<sup>60</sup> added Section 925 to the Labor Code.<sup>61</sup> This new law prohibits an employer from requiring an employee who primarily resides and works in California, as a condition of employment, to agree to a contract provision<sup>62</sup> that would require the employee to adjudicate outside of California an employment dispute arising in California<sup>63</sup> or deprive the employee of the substantive protection of California law related to that controversy.<sup>64</sup>

The bill is effective for any contracts entered into, modified, or extended after January 1, 2017.<sup>65</sup> In addition, SB 1241 makes any provision of a contract that violates these prohibitions voidable upon request of the employee.<sup>66</sup> In such a case, the matter is adjudicated in California, and California law will govern the resolution of the dispute.<sup>67</sup>

The only exception is for those cases in which the employee was represented by legal counsel related to the choice of law and venue provisions.<sup>68</sup> The legal

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54. SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Aug. 29, 2016).

55. *Id.*

56. *Id.*

57. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1241, at 2 (Aug. 31, 2016).

58. SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016) (as amended on Sep. 7, 2016).

59. See CAL. LAB. CODE § 925 (amended by 2016 Stat. ch. 632).

60. CAL. LAB. CODE § 925 (amended by 2016 Stat. ch. 632).

61. See SB 1241, 2016 Leg., 2015–2016 Sess. (Cal. 2016).

62. CAL. LAB. CODE § 925(a).

63. CAL. LAB. CODE § 925(a)(1).

64. CAL. LAB. CODE § 925(a)(2).

65. CAL. LAB. CODE § 925(f).

66. CAL. LAB. CODE § 925(b).

67. *Id.*

68. CAL. LAB. CODE § 925(e).



counsel must have negotiated the terms of an agreement to designate either the venue or forum in which the controversy arises from the employment contract.<sup>69</sup>

An adjudication specifically includes litigation and arbitration,<sup>70</sup> and the bill allows injunctive relief and attorneys' fees to be awarded if its provisions are violated.<sup>71</sup>

## V. SUPPORT ARGUMENTS

SB 1241 was supported by the California Employment Lawyers Association (CELA)<sup>72</sup> and the Consumer Attorneys of California (CAOC).<sup>73</sup> The author of the bill, Senator Wieckowski, argued that "SB 1241 focuses in on two harmful kinds of clauses that can appear in an employment contract: (1) choice of venue clauses that force a worker into an arbitration in another state; and, (2) choice of law clauses that intentionally require that a different state's laws govern the case. A worker who lives and works in California should never be forced to travel to a different state to exercise rights she has under California law."<sup>74</sup>

According to the supporters:

Increasingly, employers, particularly out-of-state employers, are imposing choice-of-law and forum selection provisions on their California workers in order to: evade California law, make it more difficult for employees to pursue legitimate claims, and ensure that any disputes are decided in a forum that is most favorable to the employer.

Needless to say, most workers lack the resources to travel across the country—let alone around the world—to pursue an employment claim in another state or country. The problem is particularly acute for lower income workers and disabled workers. Those workers that do have the resources and ability to travel might well find that the protection that they had under California law does not exist, or is not as comprehensive, in the jurisdiction that will be deciding their dispute.<sup>75</sup>

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69. *Id.*

70. CAL. LAB. CODE § 925(d).

71. CAL. LAB. CODE § 925(c).

72. CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, <https://www.cela.org/> (last visited Feb. 21, 2017) (on file with *The University of the Pacific Law Review*) (stating that, "The California Employment Lawyers Association is a statewide organization of attorneys representing employees in termination, discrimination, wage and hour, and other employment cases. We help our members protect and expand the legal rights of California's workers through litigation, education and advocacy.").

73. CONSUMER ATTORNEYS OF CALIFORNIA, <https://www.caoc.org/index.cfm?pg=history> (last visited Feb. 21, 2017) (on file with *The University of the Pacific Law Review*) (representing that "Consumer Attorneys of California is a professional organization that represents the interests of 39 million Californians. Our member-attorneys stand for plaintiffs seeking accountability from those who do wrong.").

74. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1241, at 5 (Aug. 31, 2016).

75. *Id.*

VI. OPPOSITION ARGUMENTS

Several business groups opposed SB 1241, primarily the Civil Justice Association of California (CJAC), who argued that the bill was unnecessary as California state courts have routinely protected Californians from being forced out-of-state to litigate employment disputes.<sup>76</sup> Existing law protects Californians from contractual choice of law or venue provisions that are unreasonable, unconscionable or would substantially diminish their California legal protections. Moreover, Governors Brown and Schwarzenegger had previously vetoed similar legislation, both of whom cited their concern about eliminating the discretion of the courts to weigh varying interests in the contract.<sup>77</sup>

The opposition also argued that judges evaluating these clauses for enforceability should be allowed to balance factors in individual cases to determine if choice of law or forum clauses are valid.<sup>78</sup> Prohibiting these clauses by statute is unnecessary as the law already protects Californians from unconscionable contracts.<sup>79</sup>

There are numerous instances in which California courts have disfavored venue or choice of law provisions that might adversely impact the state's residents. For instance, "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy."<sup>80</sup>

This is because "[o]ur law favors forum selection agreements only so long as they are procured freely and voluntarily, with the place chosen having some logical nexus to one of the parties or the dispute, and so long as California consumers will not find their substantial legal rights significantly impaired by their enforcement."<sup>81</sup>

As noted by the Senate Judiciary Committee, "a ban on choice of law and choice of forum clauses in employment agreements could arguably pass constitutional muster only if the ban is imposed as a condition of employment and because it would be aimed at a broad, generalized social problem potentially affecting every California employee, not a private interest matter."<sup>82</sup>

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76. CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, <http://cjac.org/about/> (last visited Feb. 21, 2017) (relating that "CJAC continues to aggressively work in the state Legislature and the courts to reduce the unwarranted and excessive litigation that increases business and government expenses, discourages innovation, and drives up the cost of goods and services for all Californians.").

77. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1241, at 9, 10 (Aug. 31, 2016).

78. *Id.* at 11.

79. *Id.* at 10.

80. *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 12 (2001).

81. *Id.*

82. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1241, at 9 (Aug. 31, 2016).

The bill does not appear to violate the Contract Clause of the U.S. Constitution<sup>83</sup> because the bill applies prospectively. The Contract Clause does not prevent the government from regulating future contract terms.<sup>84</sup> By the provisions of SB 1241, the bill applies to contracts entered into after January 1, 2017.<sup>85</sup> As a result, the Contract Clause is not implicated.

## VII. PRACTITIONER COMMENTS

While the stated intent of the new law is to prevent California employees from being forced to litigate or arbitrate disputes outside of California or to use other states' laws to resolve those disputes, practitioners should be aware of the key provisions of the new law:

- ◆ The new law applies to contracts entered into, modified, or extended on or after January 1, 2017.<sup>86</sup> As the bill is prospective in nature, it will not apply to existing contracts, unless a particular pre-existing contract is modified or extended after that date.
- ◆ The new law prohibits California as the required venue or choice of law.<sup>87</sup> A contract can contain a venue or choice of law different than California, so long as it is mutually agreed upon (i.e., an employee cannot be required to agree to such provisions as a condition of his or her employment).<sup>88</sup>
- ◆ The contract cannot be entered into as a condition of employment.<sup>89</sup> If the employment agreement is not conditioned on the job, then SB 1241 is not applicable. An employer may wish to have an employee sign the contract after his or her employment has begun. Or the employer may wish to include an “opt-out” provision in the contract.
- ◆ The new law applies only to those employees who primarily reside and work in the state.<sup>90</sup> Both requirements must be met (i.e., the employee must reside and work in California) based upon a “primary” test, which is not defined in the new law, but we presume to mean more than 50 percent of the time.

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83. U.S. CONST. art. 1, § 10 (providing that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts . . .”).

84. *Id.*

85. CAL. LAB. CODE § 925(f).

86. *Id.*

87. CAL. LAB. CODE § 925(a)(1).

88. *Id.*

89. CAL. LAB. CODE § 925(a).

90. *Id.*

- ♦ The claim must arise in California.<sup>91</sup> As a result, SB 1241 does not apply to employment disputes that arise outside of California.
- ♦ Examine whether the choice of law provision would “deprive the employee of the substantive protection of California law with respect to a controversy arising in California.”<sup>92</sup> There is no guidance provided in SB 1241 regarding what this phrase means or how a court should make such a determination.
- ♦ Whether the contract covers litigation or arbitration, the employment contract is still bound by the requirements contained in SB 1241.<sup>93</sup> As a result, popular pre-dispute arbitration agreements are subject to the provisions of this new law.
- ♦ An employer could negotiate with legal counsel for the employee before an employment contract is consummated, but this rarely happens except with highly-compensated executives.<sup>94</sup> This exception only applies if the attorney, in fact, negotiated either the choice of law or choice of venue provision, or both.<sup>95</sup> Most employers desire these contract provisions to be applicable to all employees for convenience and ease of administration.
- ♦ Keep in mind that it is up to the employee to decide whether to void the provision(s). So, an employee may agree to one or both provisions and not seek to void either provision. But that determination is made after the agreement has been signed by the parties.

Although Governor Brown ended up signing SB 1241 after having vetoed a similar bill just a few years ago, the bill arguably only codifies existing state case law and it does limit the application of the new law’s provisions. Moreover, the instances cited by the bill’s author and proponents as justification for enacting the measure are questionable because they appear to only be cases involving federal district courts applying federal choice of law.

There appears to be one limited instance of a California executive being forced to adjudicate his dispute out-of-state. Nonetheless, employers around the country will need to be aware of Labor Code Section 925 and modify their employment contracts going forward.

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91. *Id.*

92. CAL. LAB. CODE § 925(a)(2).

93. CAL. LAB. CODE § 925(d).

94. CAL. LAB. CODE § 925(e).

95. *Id.*