

New Jersey Law Adds Teeth to Mediation

The new law is designed to help the state position itself as a leading forum for international dispute resolution

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On Feb. 6, New Jersey Gov. Chris Christie signed into law legislation designed to improve and broaden international alternative dispute resolution in the state. The new law, which went into effect on May 7, is known as the New Jersey International Arbitration, Mediation and Conciliation Act. It allows nonprofit entities in New Jersey to organize centers whose principal purpose is to facilitate the resolution of international business and other disputes by arbitration, mediation, conciliation and other means as alternatives to litigation.

One key feature is that the act provides an enforcement mechanism for international mediations that is not currently found in existing New Jersey law – or, for that matter, in the vast majority of other states, including, importantly, neighboring New York, which is a leading forum for alternative dispute resolution. The act therefore takes a significant step toward positioning New Jersey at the forefront of international commerce and dispute resolution.

The new law supplements existing New Jersey laws pertaining to mediation and arbitration – including the Uniform Law Commission's Uniform Mediation Act, which was enacted in 2004; the New Jersey Alternative Procedure for Dispute Resolution; and the Uniform Arbitration Act – by establishing procedures specifically

designed to facilitate the resolution of international disputes through mediation and arbitration. Indeed, the Uniform Mediation Act does not contain an enforcement provision. For this reason, among others, we believe that the law has the potential to more significantly impact mediations than arbitrations.

Benefits to Companies

In New Jersey, most disputes that cannot be resolved amicably are litigated in state or federal courts. However, the federal courts, which would generally handle international disputes having diversity jurisdiction involving a foreign party, are already greatly overburdened. In fact, the District of New Jersey has been identified by the U.S. Judicial Conference as being in “emergency status” because of its judicial vacancies and extraordinarily heavy caseload.

For years, litigants and would-be litigants have increasingly resorted to arbitration because it has been more cost-effective and less time-consuming than traditional litigation. This has been especially true with respect to international matters because of the relative ease of enforcing arbitral awards in foreign countries and the reduced costs

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typically associated with arbitration. Arbitrations, however, have become more costly, formal and time-intensive for parties than they were in the past. This has led many prospective parties to re-evaluate the costs and benefits of arbitrating a dispute. It is no wonder that they are looking for other options besides litigation or arbitration.

The new law should help fill that gap by providing parties who mediate their international commercial disputes a statutory process to enforce awards resolving them and, generally, a simplified and less expensive process for matters that are mediated or arbitrated.

Key Provisions

The act applies to arbitrations of disputes between two or more persons, at least one of whom is a nonresident of the United States; or two or more persons, all of whom are residents of the United States if the dispute: (i) involves property located outside the United States; (ii) relates to a contract that contemplates enforcement or performance in whole or in part outside the United States; or (iii) bears some other relation to one or more foreign countries. Notwithstanding the above, the act shall not apply to the arbitration of:

- (1) any dispute pertaining to the ownership, use, development or possession of, or a lien of record upon, real property located in New Jersey, unless the parties expressly agree; or
- (2) any dispute involving family or domestic relations law.



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But here's a key piece of information that isn't highlighted in the language. As used in the act, "arbitration" does not refer only to traditional arbitrations; it also refers to mediations, conciliations or other forms of dispute resolution that involve the assistance of a neutral. In addition, "arbitral award" is defined as "an award signed by an arbitrator that may be the result of a settlement in arbitration, mediation, conciliation or other form of dispute resolution that involves the assistance of a neutral." Similarly, the definition of "center" implies a broad meaning of arbitration, and is defined as "any center organized as a nonprofit entity, whose principal purpose is to facilitate the resolution of international business, trade, commercial and other disputes between persons by means of arbitration, mediation, conciliation and other means as an alternative to litigation."

Notably, the act does not provide specific rules or guidelines that apply to any arbitration. Instead it provides that the participants are able to select any set of rules and procedures to govern the proceeding, including those prepared by private arbitral organizations, created by the participants themselves, or by the center. For example, the center may (or may permit its arbitral tribunals or other panels to):

- (1) determine the relevance and materiality of the evidence without the need to follow formal rules of evidence;
- (2) utilize any lawful methods that it deems appropriate to obtain evidence additional to that produced by the parties;
- (3) issue subpoenas or other requests for the attendance of witnesses or for the production of books, records, documents and other evidence;
- (4) administer oaths, order depositions to be taken or other discovery obtained or produced, without regard to the place where the witness or other evidence is located, and appoint one or more experts to report to it;

- (5) fix any fees for the attendance of witnesses it deems appropriate; and
- (6) make awards of interest, reasonable attorney fees and costs of arbitration as agreed to in writing by the parties, or, in the absence of an agreement, as it deems appropriate.

Another key element of the law is that arbitral awards or settlements issued by a center shall be enforced by any court of competent jurisdiction as permitted by law and consistent with the Federal Arbitration Act and the New York Convention. And based on the broad definition of the term "arbitral," this language suggests that mediations are equally enforceable. And that may prove to be a very important feature, given its rarity. In addition, for any dispute subject to the act, the center is authorized to require any parties residing in countries not signatories to the New York Convention and not having sufficient assets otherwise within the jurisdiction of the New Jersey courts to post bonds or other security.

Importance to New Jersey

The act furthers important policies and goals of the state, including the following:

- encourages the development of New Jersey as an international center for the resolution of international business, commercial, trade and other disputes;
- enhances its public policy goal of encouraging alternative dispute resolution over litigation;
- establishes a process to resolve, through arbitration and mediation, disputes between U.S.-based and foreign-based parties and, in certain circumstances, disputes between U.S. parties involving property located outside the United States or contracts to be enforced or performed outside of the United States;
- helps to provide certainty and predictability in resolving commercial disputes; and

- helps to attract international businesses to New Jersey by simplifying and codifying the international arbitration and mediation process.

The law's sponsors were New Jersey State Sen. and Minority Leader Thomas H. Kean, Jr. (R-Union), New Jersey State Sen. Sandra B. Cunningham (D-Hudson), New Jersey State Assemblyman Jamel C. Holley (D-Union), New Jersey State Assemblyman Nicholas Chiaravalloti (D-Hudson) and New Jersey State Assemblywoman Joann Downey (D-Monmouth). The sponsors and proponents of the law say that it will boost global trade in New Jersey because it will encourage and promote international business, trade and commerce in the state by making it easier for companies to solve international business disputes. They also believe that it will reduce some of the high costs of litigating commercial disputes in New Jersey and elsewhere.

Conclusion

The new law is an important tool for New Jersey to reinforce its reputation as a leading commercial and trade center for businesses throughout the world. It may help the state leverage its geographic proximity to major international commerce centers such as New York and Philadelphia, along with its lower cost structure compared with those other legal markets.

But the most significant change resulting from the act may be the establishment of mediation-specific enforcement procedures, which will afford parties greater flexibility and lower costs without sacrificing enforceability. While it leaves a number of the key rules and procedures to the discretion of the centers and parties, those uncertainties should be easily addressed by the centers once they are up and running, and should also present an opportunity for parties to customize procedures best suited for their particular business or relationship.

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