



United States

Peter S Selvin is a business trial lawyer with more than 30 years' experience. While he specialises in the areas of insurance coverage and international litigation, his experience has touched many different areas of law, including real estate, intellectual property and professional liability disputes. Within those areas, Peter's practice includes both trying cases and counselling clients on how to avoid litigation. Chief among his strengths is his ability to counsel clients and help achieve strategic business solutions.

In 2014, Peter was selected as a member of the Million Dollar Advocates Forum, an honorary trial lawyers association whose members have won million and multimillion dollar verdicts.

Peter has been published in numerous business and legal publications, including the *International Financial Law Review*, *Executive Counsel*, *Risk & Insurance* and *Global Counsel*. His publications have also appeared in professional publications in the UK, Germany, France, Mexico and Japan, among others countries.

His notable publications include a chapter on 'Avoiding and Resolving Disputes In International Commercial Litigation' in the treatise *International Law for CEOs: Lessons From Leading International Lawyers* and a chapter on international service of process in the treatise *Transatlantic Commercial Litigation and Arbitration* (Oceana). Since 2012, he has been the author of the chapter on dispute resolution in California that has been part of Law Business Research's annual treatise on international dispute resolution, which is a standard reference work in this area.

1 | What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? What is the balance between litigation and arbitration?

The principal alternatives to court litigation are arbitration and mediation.

As to arbitration, there has been considerable appellate litigation, and, in one notable case, legislation affecting this form of dispute resolution.

The appellate litigation has largely focused on questions about the requisites for the enforcement of agreements to arbitrate, the kinds of claims that will be exempt from arbitration and whether federal law in the form of the Federal Arbitration Act (the FAA) will pre-empt state statutes concerning arbitration procedure and enforcement that conflict with the federal scheme.

In terms of legislation, the California Legislature continues to express hostility towards arbitration, especially in the employment context. In a new law effective 1 January 2020, California employers can no longer require workers to arbitrate state law discrimination or wrongful termination claims. Although the enforcement of that new law has been temporarily stayed, its enactment was inspired by the #MeToo movement and was intended to prevent the silencing of workers who have experienced discrimination.

As to mediation, this form of dispute resolution remains popular in connection to the resolution of civil and business disputes. Indeed, the popularity of this form of alternative dispute resolution has resulted in the development of law in connection with this area.

In 2019, the California Legislature enacted an amendment to California's Evidence Code, which now requires attorneys to advise their clients in writing on the implications of California's legal protections for mediation communications before the client agrees to mediation.

2 | Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? Does Brexit continue to affect choice of law and jurisdiction?

By far, the most important trend is the inclusion of mandatory arbitration provisions in commercial agreements. This trend has spawned significant trial and appellate court litigation concerning the enforcement of those agreements, including the interplay between the FAA (which is strongly pro-arbitration) and corresponding



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state statutes that, in some cases, impose limits and restraints on the enforcement of arbitration agreements.

Importantly, California does not recognise or enforce pre-dispute jury trial waivers. Indeed, in a case from October 2019, the California Court of Appeal declined to enforce choice of law and choice of forum provisions in a commercial contract on the grounds that the enforcement would lead to the forfeiture of a California resident's right to a jury in connection with a civil dispute. The case highlights the sanctity of the right to jury trial, which is safeguarded in both the US and California state constitutions.

- 3 | How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction? How is the trend towards 'niche' or specialist litigation firms reflected in your jurisdiction?**

The California State Bar allows attorneys to earn certifications in approximately 12 subject areas and, thereby, promote themselves as certified specialists in those

areas. Those areas currently include family law, taxation law and estate planning, trust and probate law. Except for a certification in appellate law, the California State Bar does not currently offer certifications in the areas of dispute resolution, arbitration or alternative dispute resolution.

Outside the State Bar certification programme, attorneys practising in dispute resolution typically organise themselves into speciality groups, such as firms that specialise in plaintiff class action, white-collar defence, products liability defence and personal injury. The pertinent bar rules governing attorney advertising permit law firms to identify their core areas of expertise in their communications to clients and the public at large.

4 | What have been the most significant recent court cases and litigation topics in your jurisdiction?

There are two sets of emerging issues in California.

The first area is in connection with labour and employment disputes. In this area, the California Supreme Court issued a decision in 2018, in *Dynamex Operations West, Inc v Superior Court of Los Angeles*, that reversed decades of precedent concerning the classification of workers as either employees or independent contractors. Under *Dynamex*, the court ruled that workers are presumptively employees and not contractors, and it imposed the burden on the hiring entity that classifies a worker as a contractor to establish that this classification is supported under the 'ABC' test that it articulated in its decision.

This is a very worker-friendly decision that has profound implications for companies such as Uber and others in the gig economy marketplace. Indeed, companies in that marketplace have undertaken efforts to overturn *Dynamex* through the referendum and legislative processes.

In addition to *Dynamex*, the recent legislative initiatives Assembly Bill 51 and Senate Bill 707 impact the ability of employers to enforce mandatory arbitration provisions in connection with labour and employment disputes in California.

Separate and apart from labour and employment, the California Legislature recently passed the California Consumer Privacy Act (the CCPA), which enacts a comprehensive privacy regime affecting businesses operating in California. Among other things, it requires companies to update their privacy policies and provide specified notices about their collection of personal information, use and sharing practices. In addition, it provides for a private right of action for individuals affected by data breaches or the compromise of their personal information.

Although the CCPA is too new for there to have been any appellate cases interpreting its provisions, its enactment will undoubtedly spur the filing of privacy-related litigation in California.

- 5 | What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?**

I'm interpreting 'national courts' to mean the federal district courts and courts of appeal as distinct from the state courts. As many readers may know, the US has two sets of trial and appellate courts corresponding to the federal and state systems.

The conventional wisdom is that the quality of the judges in the federal system is superior to that in the state system. The federal courts also tend to be more rule-bound than the state court system and stricter in terms of the enforcement of deadlines so that defendants sued in state court will often 'remove' a pending case to the relevant US district court. Removal is a matter of right if there is subject matter jurisdiction in the federal court.

Arbitration is the primary alternative to court litigation. It is widely accepted that arbitration is less expensive, and more efficient, than conventional litigation. This is in part because there is not ordinarily the same degree of wide-ranging discovery in arbitration that is allowed in conventional litigation. Defendants often favour arbitration because it allows for dispute resolution without a right to a jury trial.

- 6 | Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.**

There were only a few amendments in 2019 to California's Code of Civil Procedure, which governs procedures in state trial courts. Perhaps the most notable of these is a rule that would allow parties to stipulate an initial disclosure requirement modelled after Rule 26 of the Federal Rules of Civil Procedure.

If parties opt in by stipulation to this requirement, they must exchange information at the inception of litigation. The information will include the identity of all persons likely to have discoverable information, along with the subjects of that information, that the disclosing party may use to support its claims or defences; copy or description of all documents, including electronically stored information, that the disclosing party has in its possession, custody or control that may be used to support its claims or defences; insurance agreements; and indemnification agreements.

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Importantly, this new state court procedure is triggered only by agreement of the parties, whereas the disclosure requirements under Rule 26 of the Federal Rules of Civil Procedure are mandatory.

7 | What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

Both the California Legislature and the California appellate courts have expressed hostility to pre-dispute arbitration agreements. This hostility is especially strong in the context of consumer and employee–employer disputes, where the perception is that consumers and employees lack meaningful bargaining power in resisting the imposition of those agreements. Indeed, two legislative initiatives passed in 2019, Assembly Bill 51 and Senate Bill 707, impact the ability of Californian employers to compel arbitration of labour and employment disputes.

Outside the consumer and employee contexts, pre-dispute arbitration agreements, if properly drafted, are usually enforced. The key battleground in this area is often whether the pro-arbitration procedural rules of the FAA will displace the state

procedural rules governing the enforcement of agreements to arbitrate. This is an ongoing battle in which the state and federal courts have issued divergent decisions.

8 | What are the most significant recent developments in arbitration in your jurisdiction?

There have been two highly significant Legislative developments in California affecting arbitration.

Assembly Bill 51, signed by California Governor Gavin Newsom in October 2019, prohibits employers from requiring mandatory arbitration agreements from employees. Although enforcement of this new law has been temporarily stayed, its enactment underscores the California Legislature's hostility to mandatory arbitration, especially in employment and consumer-related disputes.

Senate Bill 707, also signed by Governor Newsom last year, provides that in the context of employment disputes that are governed by arbitration employees cannot be required to bear any type of legal costs or expenses incident to the arbitration process. This new law also provides that an employer's failure to pay those arbitration costs or expenses will constitute a material breach of the arbitration agreement.

9 | How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

Mediation is utilised in a significant proportion of civil cases in California. Arbitration is typically utilised only where the parties have a pre-dispute arbitration agreement. This is thought to be because plaintiffs will typically want to preserve their right to a jury trial.

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The Inside Track

What is the most interesting dispute you have worked on recently and why?

Some years ago, I successfully represented a well-known celebrity in a case brought by a former franchisee couple of the celebrity's company, who claimed they had been indoctrinated into believing the celebrity's programme for self-improvement and, as a result, had improvidently given up their former jobs and lifestyle. The case was interesting because although it was styled as a suit for damages, it questioned the responsibility for individual decision-making in circumstances where the plaintiffs alleged that they had been 'hypnotised' owing to the celebrity's 'cult-like' persona.

Describe the approach adopted by the courts in your jurisdiction towards contractual interpretation: are the courts faithful to the actual words used, or do they seek to attribute a meaning that they believe the parties actually intended?

California follows, at least in theory, the objective theory of contracts. This means that the interpretation of contracts is generally a matter for the court as distinct from the jury. The court will ordinarily determine the legal meaning and effect of a written contract, giving effect to the words in their ordinary meanings. The parties' subjective, uncommunicated 'intent' about the meaning of the contract is ordinarily inadmissible. The key exception is when a contract term is ambiguous. In that case, extrinsic evidence, such as evidence concerning the parties' negotiations or, in some cases, expert testimony, will be admitted to explain or clarify an ambiguity.

What piece of practical advice would you give to a potential claimant or defendant when a dispute is pending?

It is critical that all litigants maintain and preserve electronic records, including emails. Failure to do so may result in the court giving a jury instruction concerning spoliation of evidence that could adversely affect the litigant's credibility to the jury.

An initial strategy call for defendants will be whether there are any opportunities to change the forum for the litigation. They should also consider at the outset whether there are any coverage opportunities under any policies of liability insurance.

For plaintiffs, the selection of forum is critical at the outset. They must also consider at the outset the availability of provisional remedies as the issuance of these often have an outcome determinative impact on the course of the litigation.