

EMERGENCY LATE FILING ELF-01-2019

DIGEST

Contracts: Political Speech Is Not a Breach

Makes void and unenforceable a contractual provision that allows a party to revoke a contract based on the exercise of free speech in connection with a public issue.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Civil Code section 1670.12, to read as follows:

1 § 1670.12.

2
3 (a) A contractual provision that waives or limits a person’s right of petition or free speech
4 under the United States Constitution or the California Constitution in connection with a public
5 issue is void and unenforceable as a matter of public policy.

6 (b) A contract shall be narrowly construed to avoid an interpretation that forbids an act in
7 furtherance of a person’s right of petition or free speech under the United States Constitution or
8 the California Constitution in connection with a public issue.

9 (c) As used in this section, “act in furtherance of a person’s right of petition or free
10 speech under the United States or California Constitution in connection with a public issue” has
11 the same meaning as in Section 425.16 of the Code of Civil Procedure.

12 (d) Nothing in this section prohibits a contractual provision that restricts speech that is
13 knowingly false, constitutes an invasion of privacy, discloses information protected as a trade
14 secret, breaches a statutory or fiduciary duty, or violates any law or regulation of the United
15 States or the State of California, including protections against workplace discrimination and
16 harassment.

(Proposed new language underlined; language to be deleted stricken)

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STATEMENT OF REASONS

The Problem (including Existing Law): Corporations based in Hong Kong are required to comply with the political mandates of the People’s Republic of China, including disciplining employees who have supported the recent pro-democracy protests. (*See China Orders Cathay Pacific to Suspend Staff Backing Hong Kong Protests* (Aug. 9, 2019) U.S. News & World Report, <https://www.usnews.com/news/world/articles/2019-08-09/china-demands-cathay-pacific-suspend-staff-supporting-protests>.) In the last week, the Party has demonstrated that punishing critics through their employers is not a tactic confined to its borders and extends to American corporations that can be held hostage due to their economic interests. (*See Matthew Yglesias, The raging controversy over the NBA, China, and the Hong Kong protests, explained* (Oct. 7, 2019) Vox, <https://www.vox.com/2019/10/7/20902700/daryl-morey-tweet-china-nba>

[hong-kong.](#)) Two days ago, Activision Blizzard, a gaming company headquartered in California, banned a professional online gamer for a year and took away his tournament winnings for stating, “Liberate Hong Kong, revolution of our age!” while responding to questions during a post-match interview. This exercise of political speech purportedly breached a ‘morals’ clause that forbade competitors from “[e]ngaging in any act that, in Blizzard’s sole discretion, brings you into public disrepute, offends a portion or group of the public, or otherwise damages Blizzard image.” (See Tom Matthiesen, *Blizzard has removed Blitzchung from Grandmasters and banned him from competing in Hearthstone following his on-stream Hong Kong protest* (Oct. 8, 2019) InvenGlobal, [https://www.invenglobal.com/articles/9254/blizzard-has-removed-blitzchung-from-grandmasters-and-banned-him-from-competing-in-hearthstone-following-his-on-stream-hong-kong-protest.](https://www.invenglobal.com/articles/9254/blizzard-has-removed-blitzchung-from-grandmasters-and-banned-him-from-competing-in-hearthstone-following-his-on-stream-hong-kong-protest))

The Solution: This resolution would declare the use of ‘morals’ clauses that limit a person’s right of petition or free speech in connection with a public issue to be void and unenforceable as a matter of public policy, with certain exceptions. For the same reason that California enacted anti-SLAPP, courts should not enforce contractual provisions that chill the exercise of political speech: “The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.” (Code of Civ. Proc., § 425.16, subd. (a).) This resolution is narrowly-tailored to accomplish this goal, as it does not prevent a company from refusing to hire someone due to their political beliefs. Nor does it create a ‘right’ that prevents the firing of an ‘at-will’ employee. Instead, it prevents the loss of agreed upon rights and benefits on the grounds that one’s support for democracy or opposition to authoritarianism constitutes a breach of contract.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known

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