HOW TO ENACT AN INTERNATIONAL ARBITRATION STATUTE

By Daniel M. Kolkey*

In 1988, California opened itself for business for international commercial arbitrations with the adoption of an international arbitration code[1] based on the UNCITRAL Model Law on International Commercial Arbitration. That model law, which was developed by the United Nations Commission on International Trade in 1985, reflected a "worldwide

Lutz, whom we honor in this symposium, was an active member of the cozy coterie of California attorneys who participated in that effort.

However, ten years later, a judicial decision undermined California's effort to welcome international commercial arbitration. On January 5, 1998, the California Supreme Court issued its opinion in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*,[4] expressly "declin[ing] … to craft an arbitration exception" to the prohibition against the unlicensed practice of law in California.[5]

The California Legislature promptly amended the California Code of Civil Procedure to provide a means for out-of-state attorneys licensed in other U.S. states to represent their clients in domestic arbitrations in California.[6] But it failed to provide any means for out-of-state attorneys or foreign attorneys to represent their clients in *international* commercial arbitrations held in California.

It took twenty years for members of the California State Bar to get a statute enacted that expressly authorized foreign and U.S. out-of-state attorneys to represent their clients in international commercial arbitrations held in California. Once again, Professor Lutz played an important role in that ena

satisfy several requirements.[39] These include (i) listing an active member of the California State Bar as the attorney of record in the arbitration, (ii) filing a certificate with the arbitrator(s) or arbitral forum, the State Bar, and the parties and their counsel, providing specified information regarding the out-of-state attorney, and (iii) obtaining the approval of the arbitrator(s) or arbitral forum for the out-of-state attorney to appear.[40] The California Supreme Court thereafter adopted rules to implement the statutory procedures, which included a fee to be paid to the State Bar.[41]

But neither section 1282.4 nor the rule adopted by the Supreme Court addressed the right of *foreign* attorneys to represent parties in arbitrations in California. And significantly, neither section 1282.4 nor the Court's rule authorized *U.S. out-of-state attorneys* to represent parties in an international commercial arbitration held in California. One reason for the latter omission was that California

THE FIRST ATTEMPT TO AUTHORIZE FOREIGN ATTORNEYS TO REPRESENT PARTIES IN INTERNATIONAL ARBITRATIONS IN CALIFORNIA

In 2013, a group of California attorneys met to discuss how to enact a law that would authorize foreign attorneys to represent their clients in international commercial arbitrations in California.[44] Howard Miller, a past President of the California State Bar and an influential member of the California bar, took the lead in developing the statutory language, contacting the California State Bar, and gaining the approval of such legislation from the State Bar Board of Trustees.

By February 2014, Miller had managed to persuade a state senator, Senator Bill Monning, who was also a member of the Senate Judiciary Committee, to sponsor the legislation that would authorize foreign attorneys to represent their clients in international arbitrations in California. To promote the bill, a prominent member of the California trial bar and I wrote le(e)1902 -19 (st)-2.6 (e)11.I5 (e)3.4 (r)- .6 (e(e)1909 (r0)02 2.1 (e(e)1909 j409 j409 j-2 (u)121.2 (e3.4 (

and California's international arbitration bar needed to feel a sense of ownership in the bill so that they would generate a great deal of support for it. In short, we needed Professor Robert Lutz.

THE WINDING ROAD TO SUCCESS

a. The Overtures

In 2015 and 2016, I got in touch with the California Supreme Court's staff about the prospect of proposed legislation to authorize foreign attorneys to represent their clients in international commercial arbitrations in California. It was clear that we needed to make a persuasive presentation to the Court not only concerning the unique nature of international arbitration—in which the forum for the arbitration may be a neutral site with no other connection with the dispute and where the governing law may not be California law

payment of a fee which would probably discourage foreign attorneys from

commercial arbitration in California.[48]

better suit California. Alternatively, as a second choice, the working group supported a proposal based on the New York rule, while raising, but discouraging, a third option based on California's authorization for out-of-state attorneys to appear in domestic arbitrations.

Under the Model Rule for Temporary Practice by Foreign Lawyers—the working group's preferred basis for the legislation—a foreign attorney in order to qualify under the rule "must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law … and subject to effective regulation and discipline by a duly constituted professional body or public authority."[52]

In such a case, under the Model Rule, as relevant here, the attorney is not deemed to engage in the unauthorized practice of law in a U.S. jurisdiction when the lawyer performs services, on a temporary basis in the jurisdiction, that (1) "are undertaken in association with a lawyer" licensed in that jurisdiction who actively participates in the matter; [53] *or* (2) "are in or reasonably related to a pending or potential arbitration" or other alternative dispute resolution proceeding held or to be held in that jurisdiction "if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice"; [54] *or* (3) "are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice,"[55] *or* (4) "arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice"[56]

The working group then added an additional requirement not found in the Model Rule: In harmony with New York's rule and to address the interests of the California Supreme Court and the State Bar, the working group's proposal added that any foreign or out-of-state attorney providing services relating to a California international commercial arbitration would be deemed to have agreed to be subject to the California Rules of Professional Conduct and the laws of California otherwise governing the conduct of attorneys as well as to California's disciplinary authority. Since New York has a similar provision and has successfully attracted international arbitrations, this did not appear to be an impediment.

In recommending the proposal based on the Model Rule to the California Supreme Court, the working group's report noted the following considerations that argued against any registration or pro hac vice requirement:

(1) It was unlikely that a registration requirement or the submission of a pro hac vice application to an arbitrator would provide any additional safeguards to the parties in light of the very nature of an international commercial arbitration in which sophisticated parties are capable of selecting qualified counsel.

(2) Registration requirements have not been viewed as necessary to protect parties in international commercial arbitrations, as demonstrated by their absence in the leading foreign jurisdictions and U.S. jurisdictions that had adopted a "Fly in-Fly out" rule for representing parties in international arbitrations.

(3)

> (iii) any dispute that concerns the terms or conditions of employment or the right to employment *as long as* it did not primarily concern the right to, or misappropriation of intellectual property. However, because some international commercial arbitrations can involve a dispute over the misappropriation of trade secrets, which might be characterized as an employment dispute, the working group carved out an exception from the exemption of employment disputes where the primary dispute concerns the misappropriation of intellectual property. These carve-outs also served the purpose of assuring California trial attorneys that this statute would not affect their practice, including their retention for handling such disputes, in any way.

While the working group also offered an alternative proposal based on the New York rule, which authorized U.S. out-of-state and foreign attorneys to provide legal services on a temporary basis,[58] that rule was not as good a fit for California. The New York rule authorized legal services on a temporary basis if the lawyer was admitted to practice as an attorney in another state, the District of Columbia, or a non-U.S. jurisdiction *if* it was undertaken in association with an attorney admitted to practice in New York, or arose out of or was reasonably related to the lawyer's practice in a jurisdiction in which the lawyer was authorized to practice.[59] These alternatives w6 (ew)17.4 ( ).7 (ier)-1.9 (n)1 (n)12.9 (ay326 Tw 1(4a)1.8 ( )]T(i)-4.6u(o)2 (p)e9)]T

international commercial arbitration or a related alternative dispute resolution proceeding.

On April 25, 2017, the Court agreed that there was merit in the working group's preferred recommendation based on the Model Rule and did not object to our pursuing legislation.

d. The Bill and the Legislative Track

Within a month, after checking with Howard Miller (who had been involved in the earlier, aborted effort in 2014), Senator Monning agreed to sponsor the legislation, which became Senate Bill No. 766.

In order to meet committee deadlines, Senate Bill No. 766 was introduced as a two-year bill. But after Senator Monning's office submitted the workin9 (Mo)2 (n)2 (nTc 0 Tw)-4.6i(t)-4.6(n)2 (g6 (h)10(w)4.69da6w-)]T

the equivalent.[63] The attorney also had to be "[s]ul... n n 70.5 ("[)]TJ(:)Tj5.65212.9J0

to represent a client in a California international commercial arbitration), or

(v)

support. That is where Professor Lutz's reputation, rich experience, and extensive contacts from a life in international law made a big difference.

Maria Chedid quickly solicited a letter of support from the Silicon Valley Arbitration & Mediation Center. Sally Harpole successfully solicited support from the International Bar Association's Arbitration Committee and the American Bar Association's Standing Committee on International Trade in Legal Services

And Professor Lutz successfully solicited support from, among others, the Beverly Hills Bar Association, Jack Coe (the associate reporter for the American Law Institute's International Arbitration Law Restatement), the California Dispute Resolution Council (with help from Sally Harpole), the American Arbitration Association's International Center for Dispute Resolution, the ABA Center for Professional Responsibility, the California

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state licensing agency. Professor Lutz and Ms. Chedid were able to persuade him that this permissive language was consistent with California's and New York's general approach of giving the state agency discretion whether to take action. Indeed, a mandatory reporting requirement would have interfered with the State Bar's discretion based on the intent, nature, and materiality of the purported violation. As a result of their response, no changes were made, and the bill was characterized as "non-controversial"

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