Kluwer Arbitration Blog

California – The Next Major International Arbitration Seat?

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Whether inside or outside the practice of international commercial arbitration, it does not take long to look at the list of the most popular seats for such arbitrations and wonder – where on earth is California? As the sixth largest economy, complete with some of the most significant business centers in the world while operating under an influential and sophisticated legal regime, one could reasonably expect California to be a popular choice when it came to choosing a seat for an international commercial arbitration. However, as reports such as the Queen Mary Survey of 2015 illustrate, this is not at all the case. Instead, the seat preference within the U.S. is thoroughly dominated by New York, with California failing to even establish itself as a clear second choice (Florida outperformed California with respect to seats of ICC arbitrations in 2015). So why the snub?

The answer may lie in its restriction with respect to legal representation. As some are aware, as it stands, out-of-state attorneys (those licensed in a U.S. state other than California) and foreign attorneys are not permitted to represent parties in international commercial arbitrations situated in California. While not definitively the reason for the state's difficulty in attracting arbitrations, it is hard to imagine that such efforts have not been significantly hampered by such a policy. Considering the numerous established and well-respected seats around the globe that have positioned themselves comfortably atop the preference lists of international companies, it would be unreasonable to expect these parties to relinquish the freedom of retaining the counsel of their choice when selecting a seat, especially considering how often the seat is completely unrelated to the dispute, making it unlikely that a CA-licensed attorney would provide any advantage.

And it is because of this unnecessary and unfortunate rule that, in February 2017, the California Supreme Court created a Supreme Court International Commercial Arbitration Working Group to study the possibility of allowing foreign and out-of-state attorneys to represent parties in international commercial arbitrations within California. That Working Group, consisting of international arbitration practitioners, released its report in late April 2017.
The Working Group ultimately provided three alternative proposals, in the form of actual proposed statutory text, indicating its clear preference for the most user-friendly of the three ("Proposal 1"). In essence, Proposal 1 was largely based on the American Bar Association's recommended Model Rule for Temporary Practice by Foreign Lawyers, with certain changes to adapt the rule to California. Some specific requirements are worth noting.

Under this proposal, a foreign attorney providing legal services in an international commercial arbitration within California must be a member in good standing of a recognized legal profession

in his/her home country and must be subject to effective regulation and discipline within that jurisdiction. Additionally, the foreign attorney must be in good standing in every jurisdiction where he/she is admitted to practice.

If eligible, such a foreign (or U.S. out-of-state) attorney would be permitted to provide legal services in connection with an international commercial arbitration under four circumstances: 1) the services are undertaken in association with an attorney who is admitted to practice in California and who actively participates in the matter; 2) the services are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice; 3) the services i) are performed for a client who resides or has an office in a jurisdiction in which the attorney is admitted to practice, or ii) are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted; or 4) the services arise out of a dispute governed primarily by international law or the law of a jurisdiction other than California.

Even if eligible, a foreign or out-of-state attorney would not be able to appear in any California courts related to the arbitration, unless permitted to do so pro hac vice pursuant to existing procedures.
Additionally, the Working Group's proposal provides that any foreign or out-of-state attorneys providing legal services under this provision would be deemed to have agreed to be subject to the California Rules of Professional Conduct, the laws of California that govern the conduct of attorneys and to the disciplinary authority of California to the same extent as a CA-licensed attorney.

The Working Group's proposed regulation should be enough to satisfy both those concerned with continuing to permit the state to monitor and regulate the practice of law within its jurisdiction, while also providing the necessary legal relaxation that could greatly increase California's attractiveness for future international commercial arbitrations.

For those worried about foreign or out-of-state lawyers practicing within California, it must again be remembered that often international arbitrations seated in California will have absolutely nothing to do with California substantive law, and thus there is no reason to believe that such foreign representation would fail to meet the standards one would expect from a CA-licensed attorney. If anything, increasing the potential attorney pool would allow parties more freedom in finding and selecting attorneys specializing in the precise type of dispute at issue, substantive law at issue, or both. Such options actually provide parties the possibility of finding superior representation than they may find if restricted to the pool of a single jurisdiction.

With respect to the potential scenario of having a foreign attorney advising on California substantive law despite the lack of training or qualification within the state, the Working Group correctly made the observation that such a foreign attorney would already be permitted to freely advise on California law in international arbitrations seated in more user-friendly jurisdictions, such as New York, Florida or a number of non-U.S. options, and would likely continue to do so if California maintained its current restrictions. Therefore, the status quo fails to achieve the goal of closely regulating those advising on California law in international commercial arbitrations.
Of course it remains to be seen precisely what will come of the Working Group's proposal. California Supreme Court Chief Justice Tani G. Cantil-Sakauye, a fairly popular jurist in the state, said that the Court "[saw] merit in [the Working Group's] preferred recommendation . . .," while the Chair of the Working Group, Daniel Kolkey of Gibson, Dunn & Crutcher, has indicated that the group will now work with the Legislature in implementing such recommended changes.

In providing the justification for its proposal, the Working Group accurately portrayed California's current system as out-of-touch with top international arbitration hubs (including those within the U.S.), costing California the opportunity to enjoy significant opportunities that come with being one of the preferred seats in this growing industry. For those hoping that California would one day see the light and open its doors to the international arbitration community, this report was a major step in the right direction.

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