Kluwer Arbitration Blog

Eureka! Foreign Attorneys Can Now Participate in California-seated Arbitrations

Giorgio Sassine (Musick, Peeler & Garrett LLP) · Wednesday, August 29th, 2018

> "Why don't you go on west to California? There's work there, and it never gets cold. Why, you can reach out anywhere and pick an orange. Why, there's always some kind of crop to work in. ***Why don't you go there?"***

– John Steinbeck, The Grapes of Wrath

Introduction

For many years, the answer for international arbitration practitioners had been simple: California law precluded foreign attorneys from participating in international arbitrations seated in California. Knowing this, most often international arbitration agreements are drafted with a seat other than California. That will soon change. As reported on 9 July 2018 in the Global Arbitration Review, "[i]n a move aimed at overhauling California's reputation as an arbitral hub, the lower house of the state legislature has passed a bill expressly permitting out-of-state and foreign lawyers to appear in international arbitrations seated there." GAR then reported on 19 July 2018 that California's Governor Jerry Brown signed the bill into law.

So why should international arbitration not now mosey on out West? Putting aside the idyllic sandy, golden beaches, the western sunsets drawn down over the Pacific, Karl the Fog blanketing over the rolling hills of San Francisco, and the heaven-like Napa Valley wine region, California also boasts economically powerful metropolises and is the United States' backbone for international business throughout the Pacific Rim, if not the world. Having grown-up in the San Francisco Bay Area, I am only amazed by Silicon Valley's collective ambition to shape humanity's future endeavors. While there has been negative press lately regarding data privacy and the moral questions underpinning the same, cafés across the Bay Area are buzzing with new ideas – at a pace that I have not seen anywhere else in the world. Not only that – the amount of international trade coming in and out of Los Angeles is staggering; and both Los Angeles and Long Beach are ranked one and two, respectively, as the largest U.S. ports. Hundreds of billions of dollars are being poured into California for mega infrastructure and construction projects, such as the high speed rail system connecting Los Angeles and San Francisco. San Francisco, alone, has seven billion-dollar mega projects planned over the next twenty years. And, of course, one cannot forget about the state's second most populous city – San Diego – where its close vicinity to Mexico and the greater-

Latin American region makes it a pivotal location for trade and culture moving across borders. In all, California's economy is the fifth largest in the world – larger than the United Kingdom, India and France – with an effective GDP in 2017 of $2.747 trillion

Background

All has not been rosy on the Western Frontier when it comes to international arbitration; but, like many great Hollywood scripts, the tale of California's place in international arbitration has a bright start, a dramatic climax, only to be followed by a happy ending. Decades ago, when California enacted an international arbitration law based on the UNCITRAL Model Law, Andre Brunel noted in the Texas International Law Journal that "California hope[d] to become the forum of choice by creating a favorable arbitral setting … [and needed] to send a clear message that this country (or this state) is hospitable to arbitration."

That all changed in 1998, when the California Supreme Court in *Birbrower*had to decide "whether an out-of-state law firm, not licensed to practice law in [California] violated section 6125 when it performed legal services in California for a California-based client." California Business and Professional Code § 6125 provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar". However, the term "practice of law" had not been defined in Cal. Bus. & Prof. C. § 6125, so the Court traced its history to determine if the definition applied to out-of-state attorneys participating in an arbitration seated in California. The Court concluded that "the practice of law in California entails sufficient contact with the California client to render the nature of the legal services a clear legal representation." Applying this rule, the Court explained that "we must consider the nature of the unlicensed lawyer's activities in the state. The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state or created a continuing relationship with the California client that included legal duties and obligations." The Court held that Birbrower's contacts and activities were sufficient to amount to the unauthorized practice of law in the State of California.

In response to *Birbrower*, California's legislature adopted California Code of Civil Procedure § 1282.4, which Professor Roger Alford noted as "adopt[ing] a *pro hac vice* approach for out-of-state attorney arbitration counsel." Cal. C. Civ. Proc. § 1282.4, in pertinent part, reads: "(a) a party to an arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title … (b) notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, an attorney admitted to the bar of *any other state*may represent the parties in the course of, or in connection with, an arbitration in this state". (Emphasis added). However, Cal. C. Civ. Proc. § 1282.4 did not expressly address the participation of foreign attorneys in arbitrations seated in California. Knowing this, companies that do international business have counsel that draft or negotiate arbitration agreements that place the venue of a potential arbitral dispute in a seat such as New York City, Singapore, or Hong Kong.

The Response From California's International Arbitration Community

The international arbitration community in California responded with incredible resolve to amend the law. For example, most recently, the California Supreme Court created the Supreme Court International Commercial Arbitration Working Group in February 2017, with the recommendation that:

California should join the 13 U.S. jurisdictions (including New York, Florida, Illinois, Texas, and

the District of Columbia) and numerous foreign jurisdictions (including Great Britain, France, Italy, Switzerland, Singapore, and Hong Kong) that authorize foreign and out-of-state attorneys to represent parties in international commercial arbitrations without any filing or fee requirement.

Of all the potential proposals, the Working Group unanimously recommended that California adopt a rule based on the American Bar Association's Model Rule for Temporary Practice by Foreign Lawyers (**ABA Model Rule**). The Working Group found the ABA Model Rule was "clearer and more inviting" than any alternative.

California's legislature responded to the Working Group's findings and drafted Senate Bill 766, which has now been signed into law. This is an important achievement and much credit is due to California's international arbitration community and those outside California who see no reason why California should not be a hub for international arbitration.

California – the next hub for international arbitration

As Lao Tzu said, "the journey of a thousand miles begins with one step." For California, it is a significant step in the right direction. As Maria Chedid, partner at Arnold & Porter, explained: "Our legislature has now spoken: when it comes to international arbitration, California's doors should be opened wide". California has the multi-cultural diversity, open and peaceful climate, large international metropolises, and top-tier international law firms and universities to attract international arbitration. California has also set the foundation to be a burgeoning international arbitration hub when it enacted its international arbitration law based on the UNCITRAL Model Law. In time, California will be on par with Singapore and Hong Kong and New York and Miami as an international arbitration hub of the Pacific Rim and Latin America, respectively. The journey out West has only just begun.

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