By prohibiting foreign lawyers from participating, California is missing out

By David D. Caron and Leah D. Harhay

Under current California law, foreign attorneys are prohibited from participating in any meaningful way in international arbitration here in California. Thus, litigants are discouraged from arbitrating their international disputes here, resulting in unfortunate economic consequences. William Slate, the chief executive officer of the American Arbitration Association, explains that Californians host less than half the arbitrations that foreign-attorney-friendly New Yorkers do, despite our “massive economy.” The International Court of Arbitration reports significantly fewer cases held in California as opposed to New York: in 2007, three versus 15, and in 2006, two versus 17. The International Centre for Settlement of Investment Disputes—the dispute settlement arm of the World Bank—explains that, although it can administer cases anywhere, California has never been requested as a choice of venue. California Code of Civil Procedure §1282.4 and Local Rule 9.43 govern the ability of attorneys who are not members of the State Bar of California to act as counsel in international arbitrations here. Both allow out-of-state attorneys to participate in these arbitrations, but provide no similar provisions for out-of-country attorneys. However, even out-of-state attorneys are not safe. In 2011, when §1282.4 sunsets, out-of-state attorneys will also be barred from appearing as counsel in California-based international arbitrations.

Therefore, for California to join states like New York, Delaware, Florida, Georgia, New Hampshire, Pennsylvania and Virginia that attract international arbitration, this state must adopt legislation that not only renews §1282.4, but goes much further. Specifically, California should streamline the procedures by which out-of-state counsel can participate in international arbitrations in California and should invite foreign counsel to appear under the same rules.

The Birbrower case provided the impetus for the California laws that govern which counsel may participate in California arbitrations. Birbrower v. Superior Court of Santa Clara County, 17 Cal.4th 119 (Cal. 1998).

Birbrower, Montalbano, Condon & Frank, a New York law firm, assisted a California corporation in preparation for a private arbitration under the auspices of the American Arbitration Association in San Francisco. Upon settlement of the case, the California client sued Birbrower for malpractice. Birbrower counterclaimed and included a claim for fees. The trial court found that Birbrower, by advising clients in California with out-of-state attorneys, had committed the unlicensed practice of law under Business and Professions Code §6125, rendering its fee agreement unenforceable.

On appeal, the California Supreme Court considered Birbrower’s request for the creation of an “exception to §6125 for work incidental to private arbitration or other alternative dispute resolution proceedings.” Birbrower also relied on New York case law determining that an arbitral tribunal is not a court of record and its fact-finding processes are not similar to court proceedings. Williamson v. John D. Quinn Const. Corp., 537 F.Supp. 613, 616 (S.D.N.Y. 1982). Thus, they See CARON page 5
argued that representing a client in arbitration is not the unauthorized practice of law. However, the court declined to carve out an exception to §6125. Specifically, the court ruled, "Any exception for arbitration is best left to the Legislature, which has the authority to determine qualification for admission to the State Bar and to decide what constitutes the practice of law."

In 2007, the Legislature responded by amending the California Rules of Court. In part, the new rule, Rule 9.43, allows an out-of-state attorney who is otherwise eligible to practice law in another jurisdiction to participate in a private arbitration in California. However, such an attorney must serve a certificate in accordance with Code of Civil Procedure §1282.4 on the arbitrators, State Bar of California, and all other parties and counsel. They must also obtain approval from the arbitral panel.

In addition, the Legislature amended §1282.4 to allow out-of-state attorneys to represent clients in California arbitrations, provided that such attorneys file a similar certificate showing the arbitrators’ approval.

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In addition to providing information on the out-of-state attorney, the certificate must also list an active member of the State Bar of California as the attorney of record. Proper certification by the out-of-state attorney, however, does not ensure the attorney’s ability to participate as counsel in a California-sited arbitration. Upon completion of all requirements established under the code, “[t]he arbitrator, arbitrators, or arbitral forum may approve the attorney’s appearance.” In addition, the code discourages repeat players.

In addition to the difficulties of certification and the uncertainty of approval for out-of-state attorneys, these laws — with very limited exceptions — do not permit the participation of foreign attorneys as counsel in the same venues. The California State Bar’s Office of Special Admissions and Specializations explains that a foreign attorney may participate in a private international commercial arbitration in California only with the assistance of local counsel. In addition, the foreign counsel likely could not speak before or during the hearing, among other restrictions. These restrictions are underscored by California’s multijurisdictional practice rules which allow certain categories of non-California attorneys to practice here to a limited extent, but exclude foreign attorneys.

By contrast, New York permits possibly the most extensive opportunities for foreign attorneys to participate in arbitration. New York federal case law holds that participating in arbitration is not actually the practice of law. Accordingly, parties can be represented by a lawyer from another jurisdiction and even possibly by a non-lawyer. Williamson, 537 F. Supp. at 616. If, however, this argument is contested, a foreign attorney may be able to apply for admission pro hac vice under the equally liberal New York Code Rule and Regulations §602.2.

The Model Rule for Temporary Practice by Foreign Attorneys adopted by the American Bar Association offers additional guidance. Under the Model Rule, a foreign lawyer does not engage in the unauthorized practice of law when, on a temporary basis and in association with local counsel, he or she participates in pending or potential alternative dispute resolution with respect to services related to the lawyer’s jurisdiction and governed by international or foreign law.

Despite the benefits of the Model Rule for Temporary Practice by Foreign Attorneys, with its uniform language and momentum building slowly among states, it has been in legislative limbo for years in California. It therefore may be quicker and easier to push for a renewal of §1282.4 with a slight modification. Specifically, a renewal should include three small words that would have an enormous effect: “An attorney admitted to the bar of any other state or foreign jurisdiction may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that” the attorney satisfies the requirements listed.

To make California even more attractive to international arbitration, the list of requirements for such attorneys should also be reduced and streamlined. In addition, the language whereby the arbitrators may approve the attorney’s appearance upon compliance with the stated requirements should be replaced with mandatory language. Finally, the discouragement of repeat appearances should be replaced with a program in which foreign attorneys can be certified for a period of time. This will encourage counsel to bring international arbitration to California.

Although these changes appear limited and attainable, they belie a much greater effort for their passage. To do so will require a concerted effort by the California State Bar and a receptive California Legislature. Several firms in San Francisco are already working to make this legislative change a reality, including Munger, Tolles & Olson and Jones Day. Hopefully, change can be brought to California law, making our golden state a golden opportunity for international arbitration.

* Continued from page 3