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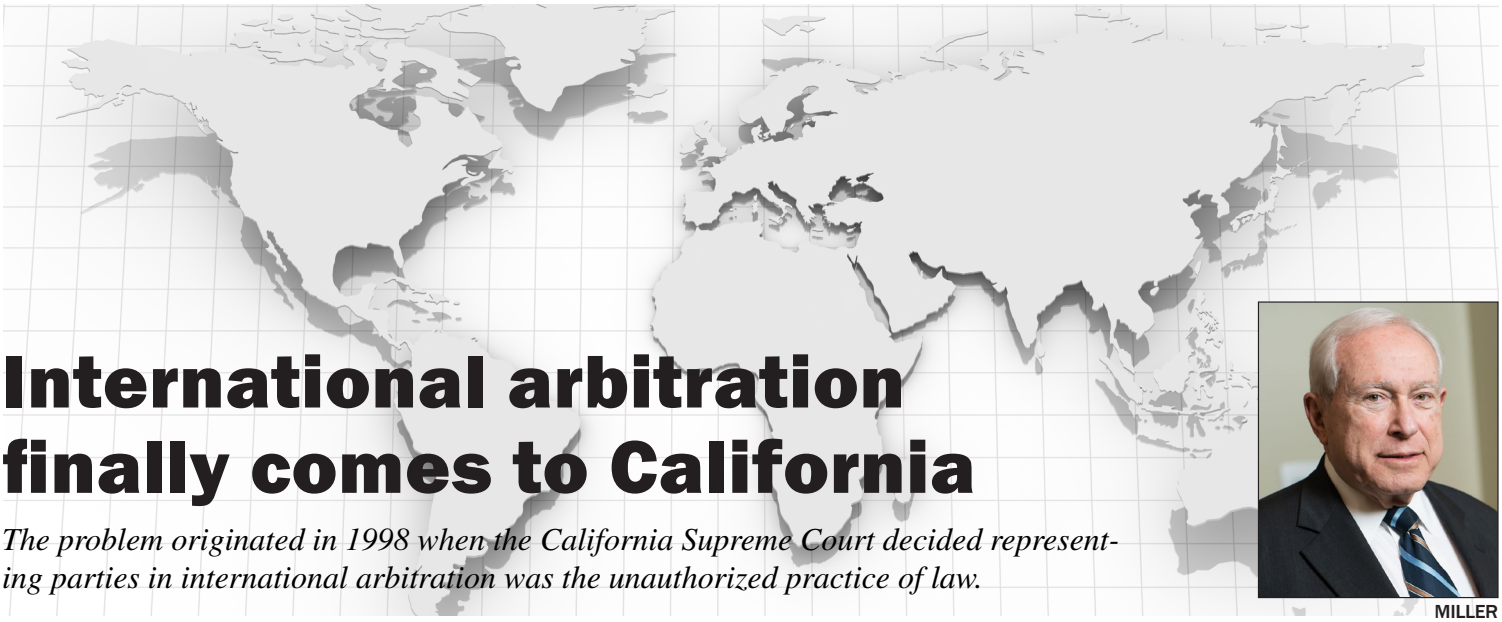

International arbitration finally comes to California

The problem originated in 1998 when the California Supreme Court decided representing parties in international arbitration was the unauthorized practice of law.

MILLER

By Howard B. Miller

International arbitration is different. International arbitration is governed by different rules than consumer, employment or domestic business arbitration. The key statutory and treaty rules are the California International Arbitration and Conciliation Act, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a treaty known as the New York Convention, signed and ratified by the United States and 155 other countries.

The importance of the difference was brought home when the California Legislature unanimously passed, and the governor signed Senate Bill 766, effective Jan. 1, 2019, amending the California International Arbitration statute with new rules for California practice. Under SB 766 a non-California lawyer qualified as a lawyer in another state or country can represent parties in international arbitrations in California. Those rules are consistent with other states and foreign jurisdictions that host international commercial arbitrations.

Why was this change made, unanimously by the Legislature, and with the support of leaders from all factions of the State Bar?

International arbitration is one of the fastest growing areas of the law, with great economic benefits to its host jurisdictions. The Economist magazine has reported the annual revenue to New York from international arbitrations including direct revenue in legal fees and associated travel and hospitality costs was over $1 billion.

The reason for growth of international arbitration is the growth of the world economy. In international transactions, whether financial, joint venture, leasing, vendor or other commercial transactions neither party is willing to trust the domestic forum of the other. Trade, investment and supply-chain relationships all depend on a trustworthy system of dispute resolution outside the potential domestic bias of each jurisdiction. As global economic growth grew exponentially, so did the essential element of international arbitration.

Other jurisdictions are well aware of the economic benefits of hosting international arbitrations. Pacific Rim international arbitrations, often including California companies, regularly go to venues in Asia. California should have been a major home for all NAFTA, Central and South American-related arbitrations involving U.S. companies, but Miami has made itself a significant venue for those disputes.

Singapore, the 38th-largest economy in the world with its largest domestic company the 274th in the world, has established itself as a major seat of international arbitration. California, depending on the daily pound sterling/dollar exchange rate either the fourth or fifth largest economy in the world, with a large and sophisticated ADR community and central to the growth of the global economy, has been for decades a backwater of international arbitration practice. Despite being home to some of the largest companies in the world, and the technology and entertainment industries, two of the essential drivers of global growth, California has languished while the practice of international arbitration grew worldwide.

The problem originated in 1998 when the California Supreme Court decided representing parties in international arbitration was the unauthorized practice of law, and a non-California lawyer could not practice or collect fees for work on international arbitration in California. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119. Under California Business and Professions Code Section 6126 the penalties for unauthorized practice of law in California may include a fine of up to $1,000, up to one year in county jail, or both. At international conferences, competitors for hosting international arbitration told lawyers around the world that if you go to California to handle an international arbitration you will have committed a crime, and under a technical reading of California statutes could go to jail.

Non-U.S. lawyers negotiating contracts with California businesses with international arbitration clauses were simply unwilling to agree to California as a venue for the arbitration, since they would not be able to appear and represent their clients in the

arbitration. The International Chamber of Commerce based in Paris and a major administrator of international arbitration only rarely in special circumstances and when it had discretion to do so seated international arbitrations in California. The ICC told people privately it was very close to permanently striking California as a potential venue.

Things started to change in 2014 when a bill, SB 907, sponsored by Sen. Bill Monning (D. Monterey) permitting foreign representation in international arbitrations unanimously passed the California Senate. The major reason set forth in the Judiciary Committee and Senate floor reports was the economic development benefit international arbitration would bring.

The judicial council, working with Sen. Monning, wanted also to be directly involved since significant issues of the practice of law were at issue. Under the leadership of Chief Justice Tani Cantil-Sakauye the California Supreme Court established a working group to make a recommendation on permitted legal representation in international arbitrations. The recommendation of the Supreme Court working group became SB 766, the current law, also sponsored by Sen. Monning, now the Senate Majority Leader. One of the critical features of the recommendation and of SB 766, and the reason all interests within the California Bar supported it, is that it does not apply to consumer or employment arbitration, and so does not carry with it disputes over those very different arbitration issues.

Changing the rules of representation is a necessary though not sufficient step to advancing international commercial arbitration in California. Old habits and ingrained knowledge, internationally and in California, die hard. At least three other critical things must happen.

First, California has to be promoted internationally so counsel and clients worldwide know things have changed. Lawyers and arbitral institutions around the world will need to recognize California is now open for international arbitration business and given the California economy and the presence of California companies they should actively join in bringing more matters to California. Their excuse not to do so is gone.

Second, California lawyers must learn and become more familiar with the rules of international arbitration. For example, an arbitration award complying with the New York Convention will be deemed valid and enforceable in any of the 156 countries that are signatories to the convention. That is not true of court judgments and is the great advantage of the convention and why international arbitration works. But that requires knowledge by counsel and the arbitrators before whom they appear of both the technical details of the convention and the California International Arbitration Act, as well as procedures in international commercial arbitrations that are different than other arbitrations.

Third, businesses in California should become familiar with the advantages they now have in being able to negotiate drafting of clauses seating the arbitration in California. That can reduce legal costs in not having to go to another jurisdiction and time and attention of executives and employees. General counsel and transaction counsel should become familiar with the most advantageous drafting of all international arbitration clauses. At the very least it adds leverage in negotiations that did not previously exist. Foreign counsel can no longer automatically say they cannot agree because of a barrier to them appearing in the arbitration in California.

Those three things are not going to happen by themselves. They will require planning, effort and implementation. A group of counsel and neutrals with experience in issues of international arbitration have formed the California International Arbitration Council, a new nonprofit, to implement those three goals and promote California international arbitration. The first major meeting of its board of directors occurred this week in San Francisco, with equal representatives from both Northern and Southern California. The council will reach out internationally, work with state and local governments, and plan contact and programs to help all lawyers and businesses throughout California benefit from new opportunity.

California may play an additional role. Mediation has not had a major role in international dispute resolution. But the California act is in full the California International Arbitration and Conciliation Act. Conciliation is another word for mediation. California has a uniquely strong mediation culture. The council may find that mediation will be more used in California cases, and there may be a role to spread the culture of mediation throughout the international arbitration community. If that happens, California in addition to being open for business in international commercial arbitration will make a beneficial and positive contribution to all international dispute resolution.

The passage of SB 766 and solving the representation issue is only a start. The real work has yet to begin.

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