LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, FEBRUARY 9, 2018

PERSPECTIVE

California is missing out on international arbitration business

By Richard Chernick and Howard B. Miller

For the past decade international arbitration has been one of the fastest growing areas of legal practice, worldwide and in the U.S. in New York and Miami. The legal and business communities in California, by itself the sixth largest economy in the world and with many vibrant diaspora communities and foreign trade and investment, should have shared in that growth. We have not. That may be about to change.

The benefits of the potential change are substantial. The Economist magazine reports that New York-based international arbitration proceedings produced more than 1 billion dollars in annual fees to New York law firms. That does not include the ancillary revenue that results to hotels, restaurants and other businesses.

California has not begun to approach its potential as a home for international proceedings through its relations with NAFTA countries, Latin America and the Pacific Rim. Now at last, thanks to a California Supreme Court International Commercial Arbitration Working Group, and Senate Bill 766, authored by Sen. Bill Monning and based on the report of that working group, passed by the Senate without opposition and awaiting passage in the Assembly, California could have the opportunity to become a major international commercial arbitration center.

How did we get here?

Though California has some international arbitrations that take place here, we have been a disfavored jurisdiction throughout the international arbitration community. At an international conference one speaker said that between California banning foreign lawyers from appearing in California, and the provision in California law making it a misdemeanor to practice law without a license, a foreign lawyer who appeared in an international arbitration in California could risk being imprisoned.

Of course, that may have been preposterous, but the statement was based on technical language in California law, and a 20-year-old California Supreme Court case known around the world by one name: *Birbrower*. Because of that case, foreign international arbitration practitioners oppose agreeing to international arbitration in California, since if the arbitration were seated in California though their clients would be here the foreign practitioners could not.

Foreign lawyers and foreign parties to international commercial agreements have largely bypassed California and have chosen to seat their arbitrations outside of California, in cities like Singapore, Hong Kong, Beijing, Shanghai, London, Munich, as well as New York and Florida, which, unlike California, permit foreign lawyers to appear in international arbitrations.

And so to *Birbrower*.

In *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119 (1998), the California Supreme Court, in a case involving a fee dispute, held that a lawyer from another U.S. state appearing for a client in a domestic arbitration was practicing law in California under Business and Professions Code Section 6125. Though there is some technical ambiguity in the opinion, it was broadly read to establish that representing a client in arbitration is the practice of law in California, and that lawyers from foreign nations could not appear in international arbitrations in California. That effect on non-U.S. lawyers was confirmed when pursuant to California Supreme Court and State Bar rules what is essentially a pro hac vice process was established to permit lawyers from other states to appear in California arbitrations, with no similar process for lawyers from foreign nations.

Based on that, foreign lawyers and foreign parties to international commercial agreements have largely bypassed California and have chosen to seat their arbitrations outside of California, in cities like Singapore, Hong Kong, Beijing, Shanghai, London, Munich, as well as New York and Florida, which, unlike California, permit foreign lawyers to appear in international arbitrations.

International commercial arbitration is a distinct field. Though the word arbitration is used for all of them, there are four distinct fields of arbitration. One is consumer arbitration, with its class action controversies. The second is domestic commercial arbitrations. Those are voluntary commercial arbitrations between businesses that are based in the same or different U.S. states. Even when the businesses are in two different U.S. states the domestic arbitration takes place in one of them, and any ensuing confirmed arbitration award is entitled to full faith and credit under Article IV Section 1 of the U.S. Constitution.

International arbitration is different, and there are at least two types. The first is voluntary commercial arbitration between two business entities based in different countries. The second type is Investor State Dispute Settlement, a voluntary arbitration proceeding involving two different countries, or most importantly, between a private entity and a foreign government. International arbitrations are governed by different rules than consumer or domestic arbitrations.

The parties to an international arbitration contract, whether between private parties or involving a nation, ordinarily agree in advance on what will happen if a dispute arises. Any nation's court will necessarily be "foreign" to one or more of the parties. International arbitration offers a neutral and impartial forum for resolving international commercial disputes. It is favored by many for procedural flexibility, as well as the enforceability of the resulting arbitral award in most international jurisdictions under an international treaty known as the New York Convention, providing that each of its signatory nations will recognize an arbitration award that conforms to the convention, thereby avoiding problems associated with enforceability of foreign judgments.

The stakes in most international arbitrations are high. California's robust, internationally oriented economy and concentration

of large companies occupying positions of global leadership make it an ideal venue for international commercial arbitration. The economic benefits of being a center for international commercial arbitration are substantial, broad-based and distributed across both the state and municipal levels. The advantages range from an increase in business for California international lawyers (and supporting experts, translators, stenographers and other professionals and staff) to an increase in business for hotels, restaurants and the business sector in general.

For California the law business is only part of it. The small business exporter to China, the importer of materials from other countries, those whose business include export-import considerations and anyone in California in a joint venture or seeking financing from abroad will have at best a protective legal tool, and at least a significant bargaining chip in their hands. California businesses, which sign innumerable international commercial arbitrations, would have some assurance there is a real chance their arbitrations could be heard in California, instead of having to travel elsewhere with all its attendant legal risks.

It is SB 766 that will provide these advantages. It began when the California Supreme Court, well aware of the advantages of the state becoming an international arbitration center, established its Supreme Court International Commercial Arbitration Working Group tasked with analyzing whether attorneys from foreign jurisdictions should be allowed to represent parties in international commercial arbitrations seated in California.

The working group analyzed the options in the context of an International Bar Association Country Guide showing 53 countries authorize attorneys from foreign countries to represent clients in international arbitrations seated in their jurisdictions, including England, France, Germany, Hong Kong, Singapore, India, Italy and Mexico. Strikingly, 19 U.S. states permit lawyers from foreign jurisdictions to represent parties in international arbitrations in their jurisdictions.

The working group then recommended a statute based on the American Bar Association's Recommendation for a Model Rule for Temporary Practice by Foreign Lawyers, which became SB 766. It establishes a foundation for California to become a significant center of international arbitration. It is important that SB 766 does not by its terms apply to consumer issues, acquisition of goods or services for primarily for personal, family or household use, health insurance plans or interaction between an individual and a health care provider.

Under SB 766 the foreign lawyer appearing in an international arbitration in California must be admitted to practice law, be a member of a recognized legal profession in a foreign jurisdiction, and subject to regulation and professional discipline in that jurisdiction. Under standard rules of ethics, the foreign lawyer will also be governed by the California Rules of Professional Conduct. But within those standard provisions foreign lawyers will be able to agree that international arbitrations for their clients may be seated in California with full confidence they will be able to appear and represent those clients in those proceedings.

Thanks to Sen. Monning and the California Supreme Court for establishing its International Arbitration Working Group, SB 766 with its ultimate adoption will announce to the world that California international arbitration is open for business.

The growth of international arbitration in California will be explored on March 15 at the Third Annual Judith B. Hollinger Symposium on International Arbitration, jointly sponsored by the USC Gould School of law and JAMS. For more information go to http://gould.law/gouldjamsadr.

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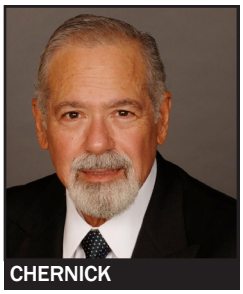
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