

HOW TO ENACT AN INTERNATIONAL ARBITRATION STATUTE

By Daniel M. Kolkey*

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In 1988, California opened itself for business for international commercial arbitrations with the adoption of an international arbitration code¹ based on the UNCITRAL Model Law on International Commercial Arbitration. That model law, which was developed by the United Nations Commission on International Trade in 1985, reflected a “worldwide consensus on key aspects of international arbitration practice ... accepted by States of all regions.”² I was one of the primary attorneys involved in drafting California’s international arbitration code.³ And Professor Robert

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1. CAL. CODE CIV. PROC. §§ 1297.11-1297.17 (1988).

2. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

3. The other California attorney primarily involved was Albert Golbert.

Lutz, whom we honor in this symposium, was an active member of the cozy coterie of California attorneys who participated in that effort.

However, ten years later, a judicial decision undermined California's effort to welcome international commercial arbitration. On January 5, 1998, the California Supreme Court issued its opinion in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*,⁴ expressly “declin[ing] ... to craft an arbitration exception” to the prohibition against the unlicensed practice of law in California.⁵

The California Legislature promptly amended the California Code of Civil Procedure to provide a means for out-of-state attorneys licensed in other U.S. states to represent their clients in domestic arbitrations in California.⁶ But it failed to provide any means for out-of-state attorneys or foreign attorneys to represent their clients in *international* commercial arbitrations held in California.

It took twenty years for members of the California State Bar to get a statute enacted that expressly authorized foreign and U.S. out-of-state attorneys to represent their clients in international commercial arbitrations held in California. Once again, Professor Lutz played an important role in that enactment. The anatomy of that statute's enactment is the subject of this article, which may also serve as a road map for adopting other state legislation addressing international commercial transactions.

THE *BIRBROWER* DECISION AND ITS AFTERMATH

California Business and Professions Code section 6125 provides, “No person shall practice law in California unless the person is an active licensee of the State Bar.”⁷

In *Birbrower*, the California Supreme Court had to decide whether the “practice [of] law in California”⁸—as contemplated in section 6125—included legal services preparing for an arbitration sited in California. There, a New York law firm had performed legal services in California on behalf of a California corporation regarding a dispute subject to a California-sited arbitration governed by California substantive law.⁹ Although the dispute was settled and never actually went to arbitration, attorneys from the New York law firm traveled to California several times

4. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119 (1998).

5. *Id.* at 133; *see also id.* at 134 n.4.

6. CAL. CODE CIV. PROC. § 1282.4(b) (2015).

7. Cal. Bus. & Prof. Code § 6125.

8. *Birbrower*, 17 Cal. 4th at 125.

9. *Id.* at 119.

to meet with their California client and its accountants and to interview potential arbitrators.¹⁰ They also filed a demand for arbitration in the San Francisco office of the American Arbitration Association.¹¹ And they returned to California to discuss a proposed settlement agreement.¹²

After settling the dispute, the California client sued the New York law firm for legal malpractice.¹³ The firm counterclaimed that the client had breached its fee agreement.¹⁴ In response, the former client alleged that the firm had violated California Business and Professions Code section 6125 by practicing law without a license, rendering the agreement unenforceable.¹⁵

The California Supreme Court observed that since section 6125 prohibited an unlicensed person from “practic[ing] law in California,” it had to determine what constituted the practice of law “*in California*.”¹⁶ It observed that “[s]ection 6125 has generated numerous opinions on the meaning of ‘practice of law,’ but none on the meaning of ‘in California.’”¹⁷ It determined that the term “practice of law” included performing services in court and “legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation.”¹⁸ And it ruled that the “practice of law ‘*in California*’ entail[ed] sufficient contact with the California client to render the nature of the legal service a clear legal representation,” as determined by the quantity and the “nature of the unlicensed lawyer’s activities in the state.”¹⁹ It cautioned that its “definition does not necessarily depend on or require the unlicensed lawyer’s physical presence in the state” since such physical presence was merely “one factor [the court] may consider in deciding whether the unlicensed lawyer has violated section 6125.”²⁰ However, it did “reject the notion that a person automatically practices law ‘*in California*’ whenever that person practices California law anywhere, or ‘virtually’ enters the state by telephone, fax, email, or satellite.”²¹ And while recognizing some exceptions to the practice of law, the Supreme Court ultimately “decline[d] ... to craft an arbitration exception to section 6125’s prohibition of the

10. *Id.* at 125.

11. *Id.*

12. *Id.*

13. *Id.* at 126.

14. *Id.*

15. *Id.*

16. *Id.* at 128 (emphasis added).

17. *Id.*

18. *Id.*

19. *Id.* (emphasis added).

20. *Id.*

21. *Id.* at 129.

unlicensed practice of law in [California].”²² It explained that “[a]ny exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law.”²³

As a result, the state high court determined that the law firm’s “extensive activities within California”²⁴—which included travel to California on several occasions to meet with its California client, to interview potential arbitrators, and to assist its client in settling its dispute with a California-based company, plus the filing of a demand for arbitration with the San Francisco office of the American Arbitration Association—constituted the unauthorized practice of law in California, thereby invalidating its fee agreement “to the extent it authorize[d] payment for the substantial legal services [it] performed in California.”²⁵ It did, however, allow the law firm to seek to recover fees for the services that it performed in New York.²⁶

Relevant to international commercial arbitrations, in dictum, citing California Code of Civil Procedure section 1297.351—which is part of California’s international commercial arbitration and conciliation code—the Court stated that “in an international commercial conciliation or arbitration proceeding, the person representing a party to the conciliation or arbitration is not required to be a licensed member of the State Bar.”²⁷ This dictum may have provided a patina of protection for those attorneys who were not licensed in California but who had represented clients in international commercial arbitrations sited in California.

However, this protection had chinks in its armor. Section 1297.351 did not actually provide a licensing exception for international commercial arbitration. Yes, that code provision provides that “[a] person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California.”²⁸ But it is located in the middle of a separate chapter, entitled “Conciliation,” addressing conciliation of disputes arising from an international commercial agreement.²⁹ It is surrounded by sections addressing the appointment of conciliators,³⁰ the report of

22. *Id.* at 133.

23. *Id.* at 133-34.

24. *Id.* at 135.

25. *Id.* at 124.

26. *Id.*

27. *Id.* at 133.

28. CAL. CODE CIV. PROC. § 1297.351 (1988).

29. *Id.* §§ 1297.341-1297.343.

30. *Id.*

conciliators,³¹ confidentiality in conciliations,³² and stays of judicial or arbitration proceedings during the pendency of the conciliation.³³ Thus, in context, section 1297.351 only afforded an exception for international commercial *conciliations*.³⁴

The *Birbrower* opinion elicited a forceful dissent from a single justice, arguing that an earlier opinion by the Court had more narrowly defined the practice of law as “the representation of another in a judicial proceeding or an activity requiring the application of the degree of legal knowledge and technique possessed by a trained legal mind”³⁵ and observing that “[r]epresenting another in an arbitration proceeding does not invariably present difficult or doubtful legal questions that require a trained legal mind for their resolution”³⁶ since arbitrators, unless required to act in conformity with legal rules, may base their decisions upon broad principles of justice and equity.³⁷ In support of her conclusion, the dissenting justice cited a federal court that had held that a firm of New Jersey lawyers not licensed to practice law in New York was entitled to recover payments for its legal services in a New York arbitration.³⁸ But the dissent failed to persuade the majority.

In response to the *Birbrower* decision, the California Legislature promptly amended California Code of Civil Procedure section 1282.4 to provide a means for out-of-state attorneys licensed in other U.S. states to represent parties in California arbitrations. That section—which has been amended multiple times since its 1998 passage—provides that out-of-state attorneys may represent clients in California arbitrations provided they

31. *Id.* §§ 1297.361-1297.362.

32. *Id.* § 1297.371.

33. *Id.* §§ 1297.381-1297.382.

34. In addition, any protection for a non-California attorney’s representation of a client in a California international arbitration afforded by the Supreme Court’s dictum in *Birbrower* was further undermined by the Legislature’s enactment of amendments to California Code of Civil Procedure section 1282.4 in 1998. As discussed below, those amendments provided a procedure for U.S. attorneys from other states to represent a party in a domestic arbitration in California in response to *Birbrower*. But in doing so, the Legislature added subdivision (j)(3) to section 1282.4, which provided that “[e]xcept as otherwise specifically provided” in the amendments, “to the extent that *Birbrower* is interpreted to expand or restrict” the right or ability of a party to be represented by any party in a nonjudicial arbitration proceeding, “it is hereby abrogated except as specifically provided in this section.” Cal. Code Civ. Proc. § 1282.4, subdiv. (j)(3). Literally read, this subdivision provided that any interpretation of *Birbrower* to expand the right to represent a party in an international commercial arbitration was “hereby abrogated.”

35. *Birbrower*, 17 Cal. 4th at 145 (Kennard, J., dissenting).

36. *Id.*

37. *Id.*

38. *Id.* at 147 (citing *Williamson v. John D. Quinn Const. Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982)).

satisfy several requirements.³⁹ These include (i) listing an active member of the California State Bar as the attorney of record in the arbitration, (ii) filing a certificate with the arbitrator(s) or arbitral forum, the State Bar, and the parties and their counsel, providing specified information regarding the out-of-state attorney, and (iii) obtaining the approval of the arbitrator(s) or arbitral forum for the out-of-state attorney to appear.⁴⁰ The California Supreme Court thereafter adopted rules to implement the statutory procedures, which included a fee to be paid to the State Bar.⁴¹

But neither section 1282.4 nor the rule adopted by the Supreme Court addressed the right of *foreign* attorneys to represent parties in arbitrations in California. And significantly, neither section 1282.4 nor the Court's rule authorized *U.S. out-of-state attorneys* to represent parties in an international commercial arbitration held in California. One reason for the latter omission was that California's international commercial arbitration and conciliation code expressly "supersede[d] Sections 1280 to 1284.2, inclusive,"⁴² of which section 1282.4 was part. Good reason existed for superseding that range of sections at the time that the international commercial arbitration code was enacted in 1988: The sections of California's domestic arbitration regime, which the international arbitration code excluded, involved provisions that were inconsistent with international arbitration principles or that would be covered by federal law for purposes of an international arbitration.⁴³ And of course, at the time California's international commercial arbitration code was enacted in 1988, section 1282.4's authorization in 1998 for out-of-state attorneys to participate in California arbitrations did not exist.

In short, the Legislature apparently did not recognize that by choosing to place the procedure for out-of-state U.S. attorneys to represent their clients in California arbitrations into section 1282.4, they were placing it in a section that California's international commercial arbitration code had superseded.

39. CAL. RULES OF COURT, rule 9.43.

40. *Id.*

41. *Id.*

42. CAL. CODE CIV. PROC. § 1297.17 (1988).

43. California Code of Civil Procedure sections 1280 to 1284.2 cover, among other things, California's unique *stay of arbitrations* when a party to the arbitration is also a party to pending litigation with a third party, ethical standards for arbitrators in California arbitrations, discovery in arbitrations in California, provisional remedies, and the validity and enforcement of domestic arbitration agreements under California law (in contrast to the federal law governing international arbitration). *Id.* §§ 1281.4, 1281.85, 1283, 1281.8, and 1281.

THE FIRST ATTEMPT TO AUTHORIZE FOREIGN ATTORNEYS TO REPRESENT PARTIES IN INTERNATIONAL ARBITRATIONS IN CALIFORNIA

In 2013, a group of California attorneys met to discuss how to enact a law that would authorize foreign attorneys to represent their clients in international commercial arbitrations in California.⁴⁴ Howard Miller, a past President of the California State Bar and an influential member of the California bar, took the lead in developing the statutory language, contacting the California State Bar, and gaining the approval of such legislation from the State Bar Board of Trustees.

By February 2014, Miller had managed to persuade a state senator, Senator Bill Monning, who was also a member of the Senate Judiciary Committee, to sponsor the legislation that would authorize foreign attorneys to represent their clients in international arbitrations in California. To promote the bill, a prominent member of the California trial bar and I wrote letters in support of the bill to the State Senate Judiciary Committee, which unanimously passed the bill out of committee. Within three months, by May 2014, the bill was unanimously passed out of the State Senate.

What could go wrong? Plenty. The California Supreme Court has “inherent authority over the discipline of licensed attorneys in th[e] state”⁴⁵ and more generally, it has the inherent “power to regulate the practice of law” in the state.⁴⁶ It raised concerns about the bill, which, after all, by virtue of its *Birbrower* decision, sought to authorize unlicensed attorneys to “practice law” in California. And just to kick a bill when it’s down, a staff member for the State Assembly Judiciary Committee, to which the bill had been referred, suggested that the foreign attorneys should be required to register *and* pay a fee in order to represent their clients in international commercial arbitrations sited in California. Such requirements, however, would have deterred foreign attorneys from choosing to arbitrate in California in the first place. In light of these developments, Senator Monning, an experienced legislator, withdrew his bill.

But this exercise offered valuable lessons: All stakeholders needed to be consulted *before* moving such a bill forward; accommodations to the stakeholders had to be made in advance to eliminate any legitimate opposition; any potential opposition from outside the stakeholders had to be sufficiently assuaged to avoid giving legislative staff leverage to insist on registration and fees, which would undermine the attractiveness of the bill;

44. The group was comprised of Howard Miller, Cedric Chao, Steve Smith, and Daniel M. Kolkey.

45. *In re Attorney Discipline System*, 19 Cal. 4th 582, 592 (1998).

46. *Id.*

and California's international arbitration bar needed to feel a sense of ownership in the bill so that they would generate a great deal of support for it. In short, we needed Professor Robert Lutz.

THE WINDING ROAD TO SUCCESS

a. The Overtures

In 2015 and 2016, I got in touch with the California Supreme Court's staff about the prospect of proposed legislation to authorize foreign attorneys to represent their clients in international commercial arbitrations in California. It was clear that we needed to make a persuasive presentation to the Court not only concerning the unique nature of international arbitration—in which the forum for the arbitration may be a neutral site with no other connection with the dispute and where the governing law may not be California law—but also concerning the Court's legitimate concerns about attorneys licensed in other jurisdictions representing their clients in arbitral proceedings in California.

In the first half of 2016, another prominent member of California's international arbitration bar, Jeff Dasteel, drafted an excellent memorandum that could be presented to the Court's staff that explained the background regarding the issue, including the practices in other jurisdictions that permitted foreign attorneys to represent their clients in international arbitrations. I then corresponded with the California Chief Justice's principal attorney at that time, providing a copy of the memorandum in July. But nothing immediately transpired.

However, in the autumn of 2016, I attended a reception for a program at which the California Chief Justice was speaking. At that reception, I mentioned the issue to both the Chief Justice and her current principal attorney, Carin Fujisaki (now serving on the California Court of Appeal as an associate justice). Shortly thereafter, the Chief's principal attorney asked that I prepare a letter to the Chief Justice, setting forth a description of the nature and importance of international commercial arbitration to California, why the court should support efforts to permit foreign lawyers to participate in international commercial arbitrations situated in California, and the options available for authorizing foreign lawyers to represent their clients in such arbitrations.

Heartened by the Chief Justice's open-minded attitude toward the issue, I submitted such a letter to the Court on December 21, 2016. It explained the following:

First, I observed that in sophisticated international commercial transactions, parties are concerned about how and where their future

disputes will be resolved and that international arbitration is a preferred means for resolving international commercial disputes because it allows both parties to avoid being subjected to the other party's courts (and thus to the other party's home advantage), and further, that arbitral awards are more easily enforced than a national court's judgments as a result of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴⁷

Second, I argued that despite California's prominence and highly developed infrastructure, foreign parties have historically been reluctant to agree to arbitrate in California, and that despite the enactment of California's international commercial arbitration and conciliation code in 1988, obstacles remained because a foreign party's own attorneys were not permitted to represent it in an international commercial arbitration in California.

Third, I noted that the *Birbrower* decision had declined to craft an arbitration exception to the prohibition in California Business and Professions Code section 6125 against the unlicensed practice of law in California and that the California Legislature had only provided a means for out-of-state attorneys licensed in other U.S. states to represent parties in domestic arbitrations in California.

Fourth, I observed that the selection of a venue in international commercial arbitrations was highly competitive with London, Paris, Geneva, Singapore, and Hong Kong, among other leading jurisdictions, permitting a party to an international commercial arbitration to be represented by any lawyer chosen by it. Further, New York—a leading jurisdiction for international arbitrations in the U.S.—and Florida—which seeks to establish itself as a venue for Latin American-related arbitrations—expressly allow foreign attorneys to appear in arbitrations taking place in those states.

Finally, I set forth three options for allowing foreign and out-of-state attorneys to represent parties in international commercial arbitrations in California: (1) the enactment of a statute that authorized an attorney licensed in any jurisdiction to participate in an international commercial arbitration in California, such as Senator Monning's bill in 2014; (2) a procedure for foreign attorneys to participate in international commercial arbitrations in California, similar to the procedure for *pro hac vice* admissions for out-of-state U.S. attorneys in California Code of Civil Procedure section 1282.4 (while noting that this option involves the

47. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

payment of a fee which would probably discourage foreign attorneys from selecting California as a venue for international arbitration); or (3) a judicial determination that the practice of law does not cover international commercial arbitrations, which could be implemented by rule, rather than statute, pursuant to the Court's inherent authority over the regulation of the practice of law.

On December 27, I received a response from the Chief Justice's principal attorney asking that the letter be supplemented to address additional questions from the Court, which I did within three days.

b. The Task Force

On February 3, 2017, the Chief Justice's office scheduled a call with me on Monday, February 6, to "discuss international arbitration." We held the call, and the next day, I started receiving calls from attorneys who had been personally contacted by the Chief Justice to serve on a task force that the Chief Justice had organized, identifying me as the chair of "the Supreme Court International Commercial Arbitration Working Group."

The other members that the Chief Justice named were Professor Robert Lutz, Fred Bennett (then with Quinn Emanuel), Cedric Chao (then with DLA Piper), Maria Chedid (then with Baker & McKenzie), Jeffrey Dasteel (with the UCLA School of Law), Sally Harpole (an international arbitrator and attorney with a focus on Asia), Steve Smith (then with Jones Day), and Abraham Sofaer (a former federal judge, former legal advisor to the U.S. State Department, and the founder and chairman of Federal Arbitration, Inc.). Saul Bercovich was named as the working group's State Bar liaison, and Carin Fujisaki was named as the California Supreme Court's liaison.

Following his appointment, Professor Lutz emailed me, "I was delighted to receive a phone call from Chief Justice Cantil-Sakauye on Monday inviting me to join a new Task Force on International Arbitration, which I understand you will chair. I am honored to join with you (again!) and look very much forward to working with you on this important issue(s)."

The Chief Justice thereafter sent a letter dated February 10, 2017, to all members of the working group, stating that Court wished to know whether "foreign and out-of-state lawyers should be permitted to represent parties in [international] arbitrations in California" and added that "[t]he report of the working group should include an analysis of all California laws and regulations relevant to the court's consideration of allowing non-California-licensed foreign and out-of-state attorneys to participate in international

commercial arbitration in California.⁴⁸ She admonished, “Bearing in mind that the California Supreme Court has an interest in ensuring the competent practice of law within the state’s borders, and an interest in ensuring the integrity of California-based international commercial arbitrations, the working group should identify issues and make recommendations for one or more regulatory options that might be considered for effectuating foreign and out-of-state attorney representation in international commercial arbitrations while safeguarding these interests. The report should identify the benefits and drawbacks of each recommended regulatory option, and should offer draft court rule language and/or statutory language as necessary for possible implementation.”⁴⁹

Accordingly, in chairing the working group, based on the lessons from the prior aborted effort, I kept in mind the following:

1. We needed to satisfy the Supreme Court’s and State Bar’s legitimate interests in ensuring the competent practice of law within the state’s borders, even if other jurisdictions did not share the same interest.
2. Any legal regime would need to be sufficiently attractive to foreign attorneys and arbitrators so that any requirements in California would not dissuade attorneys from agreeing to arbitrate in California. Among other things, I wanted to avoid requiring the payment of a fee for the privilege of representing a party in an international commercial arbitration in California or any obligation to register. Based on the aborted effort to enact such a statute in 2014, I also knew that a staff attorney for one of the judiciary committees might argue in favor of such a fee to be paid by foreign attorneys in order to represent their clients in an international arbitration in California.
3. In terms of gaining the Supreme Court’s acceptance and the legislative passage, it would help if the statute or rule (if we decided to pursue the latter route) was based on an accepted standard or model law. In short, a precedent for our proposed language would validate it.
4. The proposal also needed to address anticipated legislative objections from any influential groups. The enactment of

48. Letter from Chief Justice Cantil-Sakauye, to Daniel M. Kolkey (Feb. 10, 2017) (on file with author).

49. *Id.*

legislation is, after all, a political act, not a merit-based adjudication. In that connection, there was an ongoing, heated dispute between the California trial lawyers and the business community regarding the benefits and disadvantages of arbitration. Accordingly, we needed to satisfy the trial attorneys bar that this authorization would not affect their practice or serve as a precedent that might impact their objections to arbitration.

5. If possible, I also wanted unanimous approval by the working group for our recommendations. Any dissenting opinion might interfere with the proposal's passage. And if support for a bill faltered, the price for passage might be a requirement for fees and registration for the privilege of practicing law in an international commercial arbitration in California.
6. Finally, the Chief Justice had indicated that she wanted to get a report expeditiously.

To address each of these considerations and complete the project expeditiously, I proposed at our first meeting that we break into smaller subcommittees that would simultaneously address different parts of our charge. One committee would develop the analysis of the laws and regulations relevant to the Court's consideration of any proposed statute or rule and would research which U.S. states allowed foreign attorneys to represent parties in international commercial arbitrations in their jurisdictions and their procedures for doing so. That committee then split up its research assignments among its members. In that connection, we were fortunate to have two academics to assist with such research—Professor Robert Lutz and Jeff Dasteel. However, every member of the working group made significant contributions, enthusiastically collected useful data, and performed extensive legal research

The other committee would develop proposals for permitting foreign and out-of-state attorneys to represent their clients in international commercial arbitrations in California. I placed myself on that committee to make sure that the options would be acceptable to both the Court and the Legislature. Indeed, I had an outline of my preferred approach in my mind, which is always important in successfully chairing a meeting, even if one is persuaded, as is often the case, to modify the tentative outline during the process, because it can keep the discussion focused. And regardless of where the committee's debate led, I knew that I needed to find ways to

accommodate competing interests and find common ground while not losing sight of my key priorities.

Significantly, only Professor Lutz and the State Bar's liaison served on both committees.

Finally, to complete this project as expeditiously as possible, meetings of the committee as a whole were scheduled and held on February 15, February 27, March 6, and March 13, 2017.

By February 26, the research committee had drafted its research, which I submitted to two capable associates in my office, Jenna M. Yott and Priyah Kaul, to begin compiling into a draft report.

By March 6, the committee developing proposals for allowing out-of-state and foreign attorneys to represent their clients in international commercial arbitrations in California submitted its array of options to the full working group: (1) an authorization based on an American Bar Association commission's recommendation for a "Model Rule for the Temporary Practice by Foreign Lawyers,"⁵⁰ (2) a modified version of the foregoing recommendation, which added the requirement that only a member of the California bar could give advice on California law (which was not the working group's preferred option, but which option needed to be aired and objections thereto considered by all), (3) an authorization based on a New York rule authorizing foreign attorneys to represent their clients in international arbitrations sited in that state, (4) a variation of that New York rule, which required an attorney who is not a member of the California Bar to associate a California-licensed counsel where the dispute was governed by California substantive law, and (5) an authorization based on a streamlined version of California Code of Civil Procedure section 1282.4.

In guiding the development of these proposals, I had been particularly attentive of the concerns of the Supreme Court and State Bar. At the same time, the Court's and State Bar's liaisons needed to hear the arguments from the international arbitration bar in favor and against certain aspects of the proposals. Still, where the liaisons for the Court or State Bar pushed back, I needed to find a resolution that would satisfy all members of the working group. After each meeting of the committee responsible for proposals, I drafted up the proposals and circulated them among the members.

50. See American Bar Association Commission on Multijurisdictional Practice Report to the House of Delegates, *Model Rule for Temporary Practice by Foreign Lawyers*, Report 201J (Jan. 29, 2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201j.authcheckdam.pdf [hereinafter *Model Rule*].

By March 13, the working group had made all of the key decisions regarding the proposed legislative alternatives and its ranking of those alternatives. My office's associates, Ms. Yott and Ms. Kaul, then compiled all of the materials into a draft report, which I revised, edited, and then circulated to the working group members on March 25. Members of the working group then provided comments and minor revisions to both the proposals and the report, which I incorporated.

Since the Court wanted to consider the report and recommendations in time for its administrative conference, the final meeting to approve our report was scheduled for April 5, 2017, at which time the working group provided some final edits and unanimously approved it.

c. The Report's Recommendations

On April 11, 2017, the final version of the report was sent to the Court. To address the Court's and the State Bar's concerns, it noted that each proposal was drafted with the objective of subjecting attorneys to California's professional and ethical standards and its disciplinary authority—an approach consistent with the approach taken by New York and Florida. But it declined to require registration by the foreign or out-of-state attorneys or the payment of a fee. It also noted that unduly restricting foreign attorneys from representing their clients in California-based international commercial arbitrations appeared unnecessary because the selection of California as the arbitral venue may have little connection with the jurisdiction in which the dispute arises and there may be little relationship between the dispute and the practice of law in California. The report also observed that even where California law was negotiated as the governing law for the dispute, a stringent regime for authorizing foreign attorneys to represent their clients in California-sited international arbitrations might not protect the practice of law in California, but merely prompt parties to choose a non-California venue for the arbitration. In this light, a stringent regime for authorizing foreign attorneys to represent parties in international commercial arbitrations would simply result in the selection of a non-California forum, which protected neither the integrity of California law nor the procedural rights of any California parties to the arbitration.

The working group therefore recommended, as the best solution, an authorization based principally on the Model Rule for Temporary Practice by Foreign Lawyers recommended by the American Bar Association's Commission on Multijurisdictional Practice,⁵¹ revised to adapt the rule to

51. *Id.*

better suit California. Alternatively, as a second choice, the working group supported a proposal based on the New York rule, while raising, but discouraging, a third option based on California's authorization for out-of-state attorneys to appear in domestic arbitrations.

Under the Model Rule for Temporary Practice by Foreign Lawyers—the working group's preferred basis for the legislation—a foreign attorney in order to qualify under the rule “must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law ... and subject to effective regulation and discipline by a duly constituted professional body or public authority.”⁵²

In such a case, under the Model Rule, as relevant here, the attorney is not deemed to engage in the unauthorized practice of law in a U.S. jurisdiction when the lawyer performs services, on a temporary basis in the jurisdiction, that (1) “are undertaken in association with a lawyer” licensed in that jurisdiction who actively participates in the matter;⁵³ *or* (2) “are in or reasonably related to a pending or potential arbitration” or other alternative dispute resolution proceeding held or to be held in that jurisdiction “if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice”;⁵⁴ *or* (3) “are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice,”⁵⁵ *or* (4) “arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice”⁵⁶ or (5) “are governed primarily by international law or the law of a non-United States jurisdiction.”⁵⁷

While alternatives (3) and (4) (the legal services are performed for a client residing in the lawyer's jurisdiction *or* are reasonably related to a matter that has a substantial connection to a jurisdiction where the lawyer is authorized to practice) offer likely scenarios where a foreign lawyer might be retained for an arbitration outside of the lawyer's jurisdiction, those grounds have clear limits. By contrast, alternative (2) can be construed more broadly since there, the legal services for the arbitration need only arise out of, or be reasonably related to, the lawyer's practice.

52. *Id.* subdiv. (b).

53. *Id.* subdiv. (a)(1).

54. *Id.* subdiv. (a)(3).

55. *Id.* subdiv. (a)(4)(i).

56. *Id.* subdiv. (a)(4)(ii).

57. *Id.* subdiv. (a)(5).

The working group then added an additional requirement not found in the Model Rule: In harmony with New York's rule and to address the interests of the California Supreme Court and the State Bar, the working group's proposal added that any foreign or out-of-state attorney providing services relating to a California international commercial arbitration would be deemed to have agreed to be subject to the California Rules of Professional Conduct and the laws of California otherwise governing the conduct of attorneys as well as to California's disciplinary authority. Since New York has a similar provision and has successfully attracted international arbitrations, this did not appear to be an impediment.

In recommending the proposal based on the Model Rule to the California Supreme Court, the working group's report noted the following considerations that argued against any registration or pro hac vice requirement:

- (1) It was unlikely that a registration requirement or the submission of a pro hac vice application to an arbitrator would provide any additional safeguards to the parties in light of the very nature of an international commercial arbitration in which sophisticated parties are capable of selecting qualified counsel.
- (2) Registration requirements have not been viewed as necessary to protect parties in international commercial arbitrations, as demonstrated by their absence in the leading foreign jurisdictions and U.S. jurisdictions that had adopted a "Fly in-Fly out" rule for representing parties in international arbitrations.
- (3) Such a requirement would simply discourage attorneys from choosing California as a venue for international commercial arbitrations. As a philosophical matter, no occupational licensing system should be employed to the point that its sole function is to act as a barrier to entry.
- (4) In order to reinforce that international commercial arbitrations involve sophisticated parties engaged in a commercial dispute that do not need the protection of a pro hac vice application or registration, the working group expressly provided in its proposal that it did not apply to (i) routine employment, healthcare, and consumer disputes, such as those involving the acquisition or lease of goods or services primarily for personal, family, or household use, (ii) any dispute concerning an application for employment, or

(iii) any dispute that concerns the terms or conditions of employment or the right to employment *as long as* it did not primarily concern the right to, or misappropriation of intellectual property. However, because some international commercial arbitrations can involve a dispute over the misappropriation of trade secrets, which might be characterized as an employment dispute, the working group carved out an exception from the exemption of employment disputes where the primary dispute concerns the misappropriation of intellectual property. These carve-outs also served the purpose of assuring California trial attorneys that this statute would not affect their practice, including their retention for handling such disputes, in any way.

While the working group also offered an alternative proposal based on the New York rule, which authorized U.S. out-of-state and foreign attorneys to provide legal services on a temporary basis,⁵⁸ that rule was not as good a fit for California. The New York rule authorized legal services on a temporary basis if the lawyer was admitted to practice as an attorney in another state, the District of Columbia, or a non-U.S. jurisdiction *if* it was undertaken in association with an attorney admitted to practice in New York, or arose out of or was reasonably related to the lawyer's practice in a jurisdiction in which the lawyer was authorized to practice.⁵⁹ These alternatives were, of course, included in the working group's proposal based on the recommended Model Rule. However, the New York rule's principal authorization for foreign or U.S. out-of-state attorneys—where the temporary legal services “are in or reasonably related to a pending or potential ... arbitration ... if the services are not services for which the forum requires *pro hac vice* admission”⁶⁰—arguably could not be applied to arbitration in California because California required *pro hac vice* admission for out-of-state attorneys to engage in domestic arbitrations.⁶¹

Another consideration was that New York limits any such representation to legal services performed “on a temporary basis in th[e] State,”⁶² whereas the working group's proposal did not impose a temporal element for appearances in international commercial arbitrations in California, simply limiting the services, whatever the duration, to an

58. N.Y. RULE OF CT. OF APPEALS FOR THE TEMP. PRACTICE OF LAW IN NEW YORK § 523.2 [hereinafter N.Y. RULE].

59. *Id.* §§ 523.2(a)(3)(i), (iv).

60. *Id.* § 523.2(a)(3)(iii).

61. CAL. CODE CIV. PROC. § 1282.4, subdiv. (b)(2) (2015).

62. N.Y. RULE, *supra* note 58, § 523.2(a).

international commercial arbitration or a related alternative dispute resolution proceeding.

On April 25, 2017, the Court agreed that there was merit in the working group's preferred recommendation based on the Model Rule and did not object to our pursuing legislation.

d. The Bill and the Legislative Track

Within a month, after checking with Howard Miller (who had been involved in the earlier, aborted effort in 2014), Senator Monning agreed to sponsor the legislation, which became Senate Bill No. 766.

In order to meet committee deadlines, Senate Bill No. 766 was introduced as a two-year bill. But after Senator Monning's office submitted the working group's draft statute to the California Legislature's Legislative Counsel, the latter restructured the proposal and altered the language.

I reviewed the Legislative Counsel's draft of the bill, and a literal reading imposed on *California*-licensed attorneys the same conditions imposed on foreign attorneys for purposes of representing a party in an international commercial arbitration in California. This made no sense since California attorneys were already fully licensed to represent parties in California, and such language would likely generate unnecessary opposition to the bill.

However, recognizing that the Legislative Counsel wanted to put her mark on the legislation, rather than persuade her to return to our structure, I kept the structure in place, but revised the text of the bill to make it accurately reflect the decisions of the working group. In doing so, I made certain to keep the Supreme Court, the State Bar, the bill's sponsor, the working group, and Howard Miller advised of my proposed edits. The Legislative Counsel then incorporated the edits, to which I made further minor edits to make sure that the legislation faithfully followed the working group's recommendation.

As presented to the legislative committees (and as enacted), Senate Bill No. 766 now provided as follows:

1. The bill applied to a "qualified attorney," defined as an individual not admitted to practice law in California, but who was admitted to practice law in a state or territory of the United States or the District of Columbia, or a member of a recognized legal profession in a foreign jurisdiction, the members of which are admitted or otherwise authorized to practice as attorneys at law or

the equivalent.⁶³ The attorney also had to be “[s]ubject to effective regulation and discipline by a duly constituted professional body or public authority of that jurisdiction” and in good standing in every jurisdiction in which he or she is admitted or otherwise authorized to practice.⁶⁴

2. Under the bill, notwithstanding California Business and Professions Code section 6125—which (as previously noted) prohibits the practice of law in California except by an active member of the state bar—“a qualified attorney may provide legal services in an international commercial arbitration or related conciliation, mediation, or alternative dispute resolution proceeding if any of the following conditions is satisfied”:⁶⁵
 - (i) “The services are undertaken in association with” a California licensed attorney who “actively participates in the matter,”⁶⁶ or
 - (ii) “The services arise out of or are reasonably related to the attorney’s practice in a jurisdiction in which the attorney is admitted to practice”⁶⁷ (this is a very broadly phrased authorization that could be interpreted to cover most cases in which the foreign attorney was deemed by a client to be qualified to handle the international arbitration), or
 - (iii) “The services are performed for a client who resides in or has an office in the jurisdiction in which the attorney is admitted or otherwise authorized to practice”⁶⁸ (this authorizes representation of clients in the attorney’s home jurisdictions), or
 - (iv) “The services arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the attorney is admitted or otherwise authorized to practice”⁶⁹ (this transactional relationship of the matter to the foreign attorney’s jurisdiction(s) provides another basis for the attorney

63. CAL. CODE CIV. PROC. § 1297.185, subdiv. (a) (2019).

64. *Id.* § 1297.185, subdiv. (b)-(c).

65. *Id.* § 1297.186, subdiv. (a).

66. *Id.* § 1297.186, subdiv. (a)(1).

67. *Id.* § 1297.186, subdiv. (a)(2).

68. *Id.* § 1297.186, subdiv. (a)(3).

69. *Id.* § 1297.186, subdiv. (a)(4).

- to represent a client in a California international commercial arbitration), or
- (v) “The services arise out of a dispute governed primarily by international law or the law of a foreign or *out-of-state jurisdiction*”⁷⁰ (in other words, if the dispute is not primarily governed by California law, this affords an alternative authorization to represent the client in the international commercial arbitration, which is significantly broader than the Model Rule’s version, which is limited to disputes governed by international law or “the law of a *non-United States jurisdiction*”⁷¹). Significantly, if the dispute is governed by California law and none of the other alternative grounds for authorization exist, it is likely that a California attorney would be associated as counsel, thereby allowing the foreign attorney to invoke authorization (i) above.

As a safeguard for the Supreme Court, the law provides that it does not authorize the attorney to appear *in court* unless *pro hac vice* status is granted⁷²—which presumably would be the case in any U.S. state—and that the qualified attorney is subject to “the jurisdiction of the courts and disciplinary authority of this state with respect to the California Rules of Professional Conduct and the laws governing the conduct of attorneys to the same extent as a member of the State Bar of California.”⁷³ This parallels New York’s rule. Finally, the law permits the State Bar to report complaints and evidence of disciplinary violations to the appropriate disciplinary authority of any jurisdiction where the attorney is authorized to practice law.⁷⁴

e. The Working Group’s Efforts to Pass the Bill

Once the legislation was finalized, the working group came to the aid of getting it enacted. Jeff Dasteel helped draft a fact sheet supporting the legislation for Senate Bill No. 766. And Professor Lutz, Cedric Chao, Maria Chedid, and Sally Harpole all offered to assist in soliciting letters of

70. *Id.* § 1297.186, subdiv. (a)(5) (emphasis added).

71. *Model Rule*, *supra* note 50, subdiv. (a)(5) (emphasis added).

72. CAL. CODE CIV. PROC. § 1297.187 (2019).

73. *Id.* § 1297.188, subdiv. (a).

74. *Id.* § 1297.188, subdiv. (b).

support. That is where Professor Lutz's reputation, rich experience, and extensive contacts from a life in international law made a big difference.

Maria Chedid quickly solicited a letter of support from the Silicon Valley Arbitration & Mediation Center. Sally Harpole successfully solicited support from the International Bar Association's Arbitration Committee and the American Bar Association's Standing Committee on International Trade in Legal Services

And Professor Lutz successfully solicited support from, among others, the Beverly Hills Bar Association, Jack Coe (the associate reporter for the American Law Institute's International Arbitration Law Restatement), the California Dispute Resolution Council (with help from Sally Harpole), the American Arbitration Association's International Center for Dispute Resolution, the ABA Center for Professional Responsibility, the California Lawyers Association, and (with assistance from Sally Harpole) the American Bar Association Standing Committee on International Trade in Legal Services.

Despite the absence of any opposition to the bill, a staff member of the Senate Judiciary Committee called me about a concern regarding the bill's authorization that the State Bar *may* report disciplinary complaints against a foreign or out-of-state attorney to that attorney's appropriate disciplinary authority. He was concerned that such an authorization might imply that the State Bar does not have that authority in other circumstances. I urged him not to remove the language (which the State Bar liaison had approved), but after checking with the State Bar and the working group, I proposed adding a sentence that stated that nothing herein should be construed to limit any existing authority that the State Bar has to report complaints.

That proved satisfactory, and by February, the State Senate had unanimously passed the bill.

While I was on vacation, Professor Lutz and Maria Chedid agreed to handle any issues that arose while the bill traveled through the Assembly. Sure enough, counsel for the Assembly Judiciary Committee raised a concern about the same subdivision that the Senate Judiciary Committee staffer had questioned, but with a different point. He noted that subdivision (b) of proposed section 1297.188 of the Code of Civil Procedure states: "The State Bar of California *may* report complaints and evidence of disciplinary violations against an attorney practicing pursuant to this article to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted ..."⁷⁵ (Italics added.) He questioned why the bill did not *mandate* that the State Bar report "potential bad actors" to their out-of-

75. *Id.*

state licensing agency. Professor Lutz and Ms. Chedid were able to persuade him that this permissive language was consistent with California's and New York's general approach of giving the state agency discretion whether to take action. Indeed, a mandatory reporting requirement would have interfered with the State Bar's discretion based on the intent, nature, and materiality of the purported violation. As a result of their response, no changes were made, and the bill was characterized as "non-controversial" and placed on the Assembly Judiciary Committee's consent calendar.

On June 12, 2018, the bill passed out of the Assembly Judiciary Committee.

On July 10, 2018, the Assembly passed the bill on a 69-0 vote.

With the bill on its way to the Governor's desk, and with an enthusiasm enriched by his experience, Professor Lutz once again spearheaded the effort to solicit letters of support to the Governor to seek his signature. And that enthusiasm made a difference. As Ralph Waldo Emerson once observed, "Enthusiasm is the mother of effort, and without it nothing great was ever achieved."⁷⁶ In this case, in the short twelve-day period before the Governor's deadline to veto the bill,⁷⁷ Professor Lutz had successfully solicited support from the American Arbitration Association and its international division, the International Centre for Dispute Resolution (ICDR), the Beverly Hills Bar Association, and the American Bar Association's Standing Committee on International Trade in Legal Services. The State Bar's liaison with the working group, Saul Berkowitz, who had moved to the California Lawyers Association, arranged for it to also support signature of the bill.

On July 18, 2018, the Governor signed Senate Bill No. 766, which took effect on January 1, 2019.

The circuitous route that this legislation took from the 2014 aborted legislative effort *to* a chat at a reception in 2016 with the Chief Justice *to* the formation of a working group in 2017 *to* its unanimous report *to* the Court's approval in April 2017, and *through* the Legislature in 15 months confirms the wisdom of Abraham Lincoln's adage: "All rising to a great place is by a winding stair."⁷⁸

76. *Ralph Waldo Emerson Quotes*, BRAINYQUOTE.COM, https://www.brainyquote.com/quotes/ralph_waldo_emerson_134859 (last visited Jan. 26, 2022).

77. See CAL. CONST. art. IV, § 10, subdiv. (b)(3).

78. JAMES C. HUMES, *THE WIT & WISDOM OF ABRAHAM LINCOLN* 42 (1996).