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International Commercial Arbitration

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V. Conclusion

For the reasons set out above, the Section of International Law and Practice recommends that the United States accede to the 1974 Convention on the Limitation Period in the International Sale of Goods, as amended by the 1980 Protocol Amending the Convention on the Limitation Period in the International Sale of Goods.

The Section further recommends that, consistent with its action when ratifying the U.N. Convention on the Contracts for the International Sale of Goods, the United States declare that it will not be bound by Article I of the 1980 Protocol. This declaration is authorized by Article XII of the 1980 Protocol.

Respectfully submitted,
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Chairman

Section of International Law and Practice

August, 1989

II. International Commercial Arbitration*

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association favors recognition of freedom of parties to international commercial arbitration proceedings to choose as their representatives in those proceedings lawyers who need not be admitted to practice law in the jurisdiction where the arbitration proceedings take place.

REPORT

International commercial arbitration is a popular dispute resolution mechanism in business transactions involving parties from different nations. Such transactions typically involve elements of the law of more than one national jurisdiction, and international arbitration allows the parties in large measure to control and predict the place where any problems will be resolved, the law or laws to be applied, the procedures to be followed and the identity of the decision makers.

This system of international arbitration also permits each party to rely largely on the legal advisers with whom the party is most comfortable. Lawyers regularly participate in the negotiation of agreements that may be governed by foreign law. To the extent that the law governing the transaction is that of a jurisdiction in which those lawyers are not admitted to practice, American

lawyers are expected to familiarize themselves with it and consult counsel expert in that law to the extent appropriate.¹

If a dispute arises and an arbitration claim is made, it generally is assumed by international arbitration practitioners that each party may continue to rely on its regular legal advisers to the extent it wishes. However, the initiation of formal arbitration proceedings necessarily invokes to some degree the law of the place of arbitration, which must at the least permit the arbitration to occur. If arbitration proceedings lead to hearings, non-local lawyers may take an active role, although they of course may not appear before a court in litigation related to the arbitration without appropriate judicial permission.

Such activities raise the question whether non-local lawyers might be said to be engaging in the practice of law in any jurisdiction in which some or all of the arbitration is to take place. A view that such arbitration activity not in the local courts nevertheless constitutes the practice of law would require compliance by each party's representatives with local rules admitting lawyers to practice, which in many cases would be impossible and would preclude formal participation by the nonlocal lawyers.

International Commercial Arbitration Practice

Although facts which could raise this issue often are present in international arbitration proceedings, legal authorities addressing it are sparse. Problems over conduct of an arbitration by non-admitted lawyers seldom arise in practice. The world's major international arbitration organizations raise no objection to a party's representation based on local practice of law rules, and it is rare for a party to object to another party's choice of lawyers on this basis. Foreign lawyers regularly represent parties in arbitration proceedings in major international arbitration jurisdictions such as England,² France, Sweden, Switzerland and the United States.

*This Report was approved by the House of Delegates at the Honolulu meeting in August 1989. The Report emanated from the Section's Committee on International Commercial Arbitration. The Committee's Chair, James H. Carter, was principally responsible.

1. See, e.g., *ABA Report on Japanese Law Practice*, 21 INT'L L. 278, 282-83 (1987).

2. When the subject of participation by non-English lawyers in London arbitrations was raised by a Swedish lawyer at a 1985 "Forum London" program, the program's Chairman, Lord Justice Kerr, responded:

"But, as the speaker knows, there is absolutely nothing in this country, as there is I think in some other countries, which prevents parties who wish to arbitrate to do so in London, before whatever tribunal they choose, selecting their own legal advisers. We have no Rules of etiquette or law which preclude this in any way." *Conference on Contemporary Problem in International Arbitration* at 156.

A Canadian international arbitration administering agency lists freedom of choice of counsel as one of its jurisdiction's selling points: "Our foreign clients can retain their own legal counsel or advocates whether or not they are licensed to practice in British Columbia." British Columbia International Commercial Arbitration Centre, *International Commercial Arbitration: The Canadian Advantage* at 2.

In addition, in many instances parties retain lawyers in the arbitration jurisdiction either to represent them as the sole counsel appearing of record in the matter or to appear with the parties' non-local counsel. This may be done as a matter of prudence in case an application for judicial intervention in the arbitration is made or if an award is to be reviewed or enforced at the place of arbitration, in which cases the assistance of lawyers admitted to appear in the local courts will be necessary. Sometimes the nature of the issues, the general quality or special expertise of local lawyers or other factors also may suggest to a party that locally-admitted lawyers should take a role in an international arbitration. So long as local lawyers form part of a party's legal team, the status of the non-local lawyers is seldom questioned.³

U.S. DOMESTIC JURISPRUDENCE

The basis on which this international arbitration custom rests has not been widely discussed. In the United States, there is limited jurisprudence involving participation by a lawyer admitted in one or more U.S. states in an arbitration occurring in a state in which the lawyer is not admitted. The three most widely known instances occurred in the 1970s and involved labor arbitration. The Unauthorized Practice of Law Committee of the Florida Bar found in 1973 that such representation constituted the unauthorized practice of law if it involved the presentation of evidence, examination of witnesses, or consideration and presentation of questions of law. Similar committees in New Jersey and Connecticut considered cases also raising this issue but declined to render merits opinions.⁴

Arbitration spokesmen thereafter argued⁵ that the Florida result was unsupported because U.S. labor arbitration, and commercial arbitration generally, differ in important ways from litigation. They involve fewer formalities and, at

3. In contrast, some laws or arbitration organization rules occasionally require that all arbitrators be of local nationality. For example, Russian and Chinese Maritime Arbitration Commissions effectively require that arbitrators be of local nationality. See § 4 of the U.S.S.R. Statute on the Maritime Arbitration Commission, *reprinted in* 6 Benedict on Admiralty 7-142.15 (1988), as well as §§ 4(c) and 9 of the Provisional Rules of the Chinese Maritime Arbitration Commission, *reprinted in* 6 Benedict 7-153 and in 3 Y.B. Comm. Arb. 249 (1978). However, the same Russian and Chinese organizations also provide that attorneys representing the parties may be of any nationality. See U.S.S.R. Statute § 11; Chinese Rule 20.

The issue of arbitrator nationality has been recognized by the drafters of the UNCITRAL Model Law on International Commercial Arbitration. 24 I.L.M. 1302 (1985), 11 Y.B. Comm. Arb. 350 (1986). Article 11(1) of the Model Law specifies that unless it is otherwise agreed by the parties, no person will be excluded from service as an arbitrator on the basis of nationality.

4. See Aksen, *Arbitration and the Unauthorized Practice of Law*, 172 N.Y.L.J. 112 (Dec. 11, 1974, p. 1); Association of the Bar of the City of New York Committee Report, *Labor Arbitration and the Unauthorized Practice of Law*, 30 The Record 422 (1975); but see *American Automobile Ass'n v. Merrick*, 117 F.2d 23 (D.C. App. 1940) (automobile club's lay representation of members in arbitration did not involve practice of law); Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 171-21 (1967); Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276 (1967).

5. E.g., Aksen, *supra* n.4.

least in the case of labor arbitration, may rely more heavily on factual presentations which can be and often are made by non-lawyers.

Whether as a result of these arguments or otherwise, practical acceptance of unrestricted interstate practice in arbitrations in the United States—both labor and commercial—has since become universal. In 1982 the U.S. District Court for the Southern District of New York, in a decision by Judge Edward Weinfeld, held that a New Jersey lawyer who participated in a construction industry arbitration in New York was not engaged in the practice of law and that his firm therefore could recover a fee for his services.⁶ Citing an absence of any authority to the contrary, the court noted procedural distinctions between litigation and arbitration and relied in large part on the commentary on the three earlier labor cases. Today representation of parties in arbitrations in New York by non-New York lawyers is common.

No American state has yet codified the status of non-local lawyers participating in arbitrations. However, California's 1988 international commercial arbitration and conciliation statute,⁷ which closely resembles portions of the UNCITRAL Model Law, does address the issue of representation in *conciliation* proceedings, as follows:

The parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California.⁸

Recent International Decisions

With the growth of international arbitration and the multiplication of centers in various cities which seek to host arbitration proceedings, the issue of representation in an international arbitration has become a subject of heightened discussion and occasional litigation. There are two recent judicial precedents. In the first, a 1983 decision,⁹ the High Court of Barbados held that as a general matter an attorney admitted to practice in New York could represent a party in international arbitration proceedings involving the construction industry in Barbados without conditions; but the court also sustained the arbitrator's requirement that the American lawyer associate local counsel in the matter who would act with respect to issues of Barbados law. The Barbados court reasoned that appointment of an arbitral tribunal commits the parties to its rulings on procedural matters, including rulings on who may appear and speak.¹⁰

6. *Donald J. Williamson, P.A. v. John D. Quinn Construction Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982).

7. Cal. Civ. Pro. Code §§ 1297.11–1297.432 (West 1989).

8. Cal. Civ. Pro. Code § 1297.351 (West 1989). The California statute goes somewhat beyond the UNCITRAL Model Law in the case of arbitrator nationality, *supra* n.3, stating flatly in § 1297.111: "A person of any nationality may be an arbitrator."

9. *Lawler, Matusky & Skelly v. Attorney General of Barbados*, No. 320 of 1981 (Barbados). A copy is attached to this Report.

10. The court relied in part on *Bremer Vulkan v. South India Shipping Corp.* [1861] C.B. (N.S.) 312.

More recently, in 1988 the High Court of Singapore enjoined United States lawyers who had not associated Singapore counsel with them in a matter from acting or appearing on behalf of one of the parties to an international arbitration proceeding there which also involved a building construction dispute.¹¹ The Singapore court held that Singapore's Legal Profession Act applies to arbitrations and contains no exception to the definition of local law practice for international arbitration proceedings.¹²

Similar questions also have been raised in Japan,¹³ even though international arbitrations have occurred there in the past with the participation of non-local lawyers as representatives of parties.

Arbitration and the Practice of Law

National laws differ greatly in their definitions of the practice of law.¹⁴ Some laws, such as those of England, define this field narrowly, thus permitting a wide scope for activity by foreign lawyers, including their participation in international arbitrations in England.¹⁵ Others, such as the laws of Japan, define the practice of law more broadly and thereby greatly limit the activity of foreign lawyers.¹⁶ The extent to which activities by non-local lawyers involving international arbitration are regulated by local practice of law concepts undoubtedly will continue to vary.

In support of the view that such restrictions are necessary, it can be argued that more formal types of international arbitration are unlike labor arbitration and instead are similar to litigation, so that they require that standards be set and controls maintained for the protection of the public. Since there may be no effective international control of lawyers who engage in such arbitration, it is said, only local regulation in each jurisdiction can fill this need.

11. *Builders Federal (Hong Kong) Ltd. et ano. v. Turner (East Asia) Pte. Ltd.*, No. 90 of 1987 (Singapore), reprinted in 5 J. INT'L ARB. 140 (1988); see Lowenfeld, *Singapore and the Local Bar: Aberration or Ill Omen?* 5 J. INT'L ARB. 71 (1988).

12. The Singapore Legal Profession Act, reprinted in Lowenfeld, *supra* n.11, §§ 31(g) and (j), does contain exceptions to the local bar admission requirement for persons serving as arbitrators and for representatives of parties before Singapore's Industrial Arbitration Court or the Syariah Court.

13. See, e.g., Taniguchi, *Commercial Arbitration in Japan* (International Council for Commercial Arbitration Conference Papers, Tokyo 1988); *Commercial Arbitration: Japan Is Odd Man Out*, EAST ASIAN EXECUTIVE REPORTS, March 15, 1989, at 12.

14. See Note, *Providing Legal Services in Foreign Countries: Making Room for the American Attorney*, 83 COLUMB. L. REV. 1780 (1983); Kosugi, *Regulation of Practice by Foreign Lawyers*, 27 AM. J. COMP. L. 678 (1979); Comment, *International Legal Practice Restrictions on the Migrant Attorney*, 15 HARV. INT'L L.J. 298 (1974); Note, *Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice*, 80 HARV. L. REV. 1284 (1967).

U.S. precedents also are not consistent. See Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

15. Note, *Providing Legal Services at 1781*.

16. *Id.*; see ABA Report, *supra* n.1.

The arguments against restriction are based primarily on the fact that the leading arbitration site nations impose none and have experienced no difficulties as a result. To the extent that the issue has been considered, courts have been willing either to characterize commercial arbitration as distinct from litigation and thus not the practice of law or to treat it as an activity best regulated by the chosen arbitral tribunal. In its 1983 decision, the High Court of Barbados reviewed both English and U.S. precedents and concluded that the common law grants a private arbitrator control over proceedings before him or her and, subject to the arbitrator's rulings, permits a party to the arbitration to be represented by any person, including a person not admitted to practice law in any jurisdiction. The Barbados Court reasoned that statutes restricting the practice of law are to be examined to determine whether they have repealed this set of common law rights, and in the case before it held that there was no such restriction. In the leading U.S. interstate decision, as noted above, the Court readily accepted that conduct of a construction arbitration, like a labor arbitration, is not the practice of law.¹⁷

In addition, national controls do exist. In the United States, lawyers who act with respect to a transaction involving the law of a jurisdiction in which they are not admitted to practice are required to inform themselves of it and to associate with them lawyers expert in such law to the extent necessary to assure that reasonable care is exercised in the giving of advice.¹⁸ This principle applies to the conduct of arbitrations as well as to other commercial transactions. Also, controls may be exercised by arbitrators and failures to use proper care can expose a lawyer to disciplinary measures or even civil liability. Lawyers admitted in a jurisdiction generally are subject to professional discipline for activities occurring anywhere, including in foreign countries. With these safeguards, conduct of commercial arbitrations by non-local lawyers, including non-American lawyers, has become accepted and has given rise to no reported difficulty.

Parties to international commercial transactions have a strong interest in choosing their representatives based on the skills they deem appropriate. Indeed, if a contract is governed by a law other than that of the place of arbitration, it would seem natural that lawyers familiar with the governing law play a prominent role. Such parties as a rule are not in need of a high degree of legal protection from abuse by their own lawyers, including lawyers who represent them in arbitration proceedings. Permitting party autonomy (subject to control by arbitrators) in the selection of these representatives helps further international confidence in a system of arbitral dispute resolution which harmonizes differing national legal traditions and does not subject any party entirely to "home town justice" under rules likely to favor another party. If one party can use local practice of law restrictions to establish a real or perceived advantage over a party of a different nationality, the development of a neutral system of international arbitration will be hindered.

17. *Donald J. Williamson, P.A. v. John D. Quinn Construction Corp.*, *supra* n.6.

18. See *ABA Report*, *supra* n.1.