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General

Almost thirty years ago, the New York State Legislature adopted, and the Governor of the State signed, legislation on the regulation of foreign lawyers and law firms established or seeking to become established in New York, and the courts of New York adopted rules pursuant to this legislation providing for the licensing of qualified foreign lawyers as legal consultants. (These rules as amended are referred to as the New York Rules.) When in 1993 the American Bar Association (ABA) adopted a Model Rule on the licensing of foreign lawyers as legal consultants, it adopted a Model Rule substantially identical to the New York Rules.

Over the decades, New York has developed considerable jurisprudence affecting and experience with the regulation of foreign lawyers and law firms. Few other U.S. states have adopted the provisions of the ABA Model Rule in as unrestrictive a manner as has New York. Moreover, none of these states has acquired as extensive jurisprudence and experience involving legal consultants as has New York, or is an international legal center on the scale of New York.

The rationale of the New York Rules was reflected in the August 1993 Report of the ABA Section of International Law and Practice that was submitted to the ABA House of Delegates when it adopted the ABA Model Rule. In relevant part, that ABA Report reads as follows:

> "Practice at the transnational level inevitably involves advice on transactions, disputes and other matters that are, or may be, affected by the laws of several national jurisdictions, as well as by the growing body of international law that applies directly to private transactions and legal relationships. As a practical matter, it is simply not feasible to break that advice down into independent elements to be advised upon separately by different lawyers. Rather, the rendering of such advice is an inherently synthetic process, involving close collaboration among lawyers with the requisite experience and qualifications in dealing with the various bodies of law that are actually or potentially involved. Lawyers advise on transactions and disputes, not on laws in the abstract; indeed, part of the task of the international practitioner is the determination as to which country's (or countries') laws will in fact apply in a given matter. Thus, when the Japanese government in its 1986 law concerning practice by foreign lawyers in Japan limited the scope of practice of such lawyers to the giving of advice on the law of the jurisdictions in which they were admitted to practice, the [American Bar] Association registered its strong opposition to that restriction."

Current Round of Trade Negotiations on Legal Services

The rationale of the New York Rules is that the foreign lawyer and law firm established in New York should be able to render advice that (in the words of the ABA Report mentioned above) "takes on the aspect of a seamless web" and is not subject to "unnecessarily restrictive" requirements. Given this rationale, it is not surprising that New York is a major international legal center in which many foreign lawyers and law firms, operating under the New York Rules, practice just as though they were domestic New York establishments. As regards the current round of trade negotiations on legal services, New York seeks for its lawyers and law firms abroad a right of establishment akin to the right of establishment that New York affords to foreign lawyers and law firms in New York.

The essence of the right of establishment just referred to can be summarized as follows:

1. An establishment in a host country would be entitled to comprise home-country, host-country and third-country lawyers. The relationships among them could be those of partners or shareholders, or employers and employees. The establishment would have to be owned and controlled exclusively by lawyers.
2. The establishment in a host country would be entitled to practice law under the name used in the home country, provided that, under host-country rules, the name did not create the impression that the establishment was operated by persons other than those actually or formerly involved in the practice of law by the lawyer or law firm in question.
3. The host-country establishment would be entitled to supply legal services (a) which the relevant lawyer or firm was entitled to supply in the home country, and (b) relating to the law of the host country if where appropriate the services were based on the services of host-country lawyers. Such host-country lawyers could be lawyers within the establishment itself.
4. The host country would act on applications for registration by foreign lawyers or firms within a reasonable period of time in a reasonable, objective and impartial manner pursuant to transparent rules. Similarly, in the event of disciplinary action by the host country involving foreign lawyers or firms, such action would be administered in a reasonable, objective and impartial manner.
5. An establishment in a host country could take a form available to host-country lawyers and firms, or could take the form of a branch of a home-country firm.
6. Foreign lawyers in a host country could use their home-country titles and, where applicable, titles authorized by the host country.
7. At their option, foreign lawyers in a host country would be entitled to qualify as host-country lawyers under reasonable rules that were no more restrictive than those applicable to host-country nationals.

Admission to the Bar

In addition to the New York Rules for the licensing of legal consultants, New York has relatively permissive rules for candidates from abroad who seek to take the New York State Bar Examination in order to gain admission to the New York Bar. The basic requirement is that the foreign-educated candidate complete 20 semester hours of study in a U.S. law school. (This requirement may be dispensed with if the candidate has completed three years of legal study in

an English Common Law jurisdiction.) These bar-admission rules can be called relatively permissive, because some 95% of foreign-educated candidates who take a U.S. bar examination take the New York State Bar Examination. The International Section of the New York State Bar Association has been studying the possibility of linking New York's bar-admission rules and legal-consultant rules in a manner that would provide additional potential benefits to foreign lawyers in New York, but at this writing this possibility is still being considered and may hinge on whether reciprocal benefits would be granted to New York lawyers and firms abroad.

Multi-Jurisdictional Practice

The ABA has adopted a Model Rule on Multi-Jurisdictional Practice that would reduce restrictions on practice across state lines within the United States. The House of Delegates of the New York State Bar Association has recommended that the New York courts adopt this Model Rule but modify it, in light of "New York's place as the nation's commercial and legal center," to reduce restrictions even further than as proposed by the Model Rule. The changes proposed for New York would not limit lawyers from other states to practicing in New York "on a temporary basis"; would ease the language dealing with what constitutes a "systematic and continuous presenee" in New York; and would broaden the definition of services qualifying for practice across state lines. This proposal is pending before the New York courts.

In one respect, multi-jurisdictional practice in the United States can be contrasted with the Establishment Directive in the European Union. The benefits of that Directive are limited to EU nationals. It seems unlikely that the benefits of multi-jurisdictional practice in the United States will be limited to U.S. nationals. On the contrary, it seems likely that non-U.S. nationals who qualify as members of a U.S. Bar will benefit from the U.S. rules just as though they were U.S. nationals.

Fly-In-Fly-Out Activities

Among the topics being considered in the context of the World Trade Organization's General Agreement on Trade in Services is the status of lawyers who, in carrying out their professional activities, make brief cross-border trips—so-called fly-in-fly-out activities. There would seem to be significant support in New York and elsewhere for the view that these activities have been governed by international custom and practice tantamount to customary law, and that the activities are therefore quite legal so long as they are reasonable in scope and duration. Complementing this point of view is concern that an attempt to create new rules in this area might result in the creation of problems that have not existed hitherto, and might, instead of facilitating cross-border legal practice, produce the opposite result.