# Making Texas More Competitive in International Law

BY LARRY B. PASCAL

The Texas Supreme Court recently published proposed rule changes that largely adopt the unanimous recommendations—referred to as the reforms—of its Task Force on International Law Practice in Texas. The reforms address three primary areas: (1) eligibility of foreign lawyers to sit for the Texas bar exam (primarily intended for licensed foreign lawyers who have graduated from an accredited law school in their home country and complete an LL.M. at an American Bar Association-accredited law school); (2) the foreign legal consultant (FLC) certification for foreign lawyers who wish to solely practice the law of their home country while working in Texas; and (3) the *pro hac vice* rule permitting a foreign lawyer to appear in a Texas court proceeding upon application to the judge and with the presence of Texas counsel. The reforms would make Texas competitive with New York and California, the perennial leaders in this area, and create expanded commercial opportunities for the state's lawyers.

# **Charge and Composition of Task Force**

The Texas Supreme Court charged the task force with the following three primary tasks: (1) clarify relevant issues; (2) study recent developments in law related to foreign-trained lawyers; and (3) modernize existing criteria to meet the needs of international law practice in Texas. The task force was comprised of a diverse group of attorneys, including lawyers from private firms, in-house legal departments, and academia, as well as representatives from the Texas Board of Law Examiners, State Bar of Texas, and Texas Supreme Court's Unauthorized Practice of Law Committee. This range of perspectives was essential, as rule revisions had to be drafted to function with bar rules and practices around the world. Task force meetings were held in Austin, and the staff and a justice of the Texas Supreme Court attended many of the meetings. The task force worked for more than three years on the project, tendering its report to the Supreme Court in December 2012. The recommendations were adopted unanimously.

### **The Texas Potential and Paradox**

Texas's geographic, demographic, and economic characteristics place it in an enviable position for advancements in international law. For example, the state's proximity to

Latin America makes it an attractive trade partner for many countries, such as Mexico and Brazil.<sup>2</sup> Texas has also been very successful in attracting foreign investment in the energy sector and various other industries (e.g., technology), and it enjoys broadly diverse foreign trade partners.<sup>3</sup> Finally, the Lone Star State has more than 2,000 foreign multinational organizations and is the headquarters of many Fortune 500 companies.<sup>4</sup>

Despite its size and economic potential, Texas paradoxically lags significantly behind New York and California—and, for that matter, many other smaller states with far lower levels of international commerce—in the international law area. This is due to outdated and restrictive eligibility rules that make qualifying to sit for the Texas bar exam too difficult, costly, and uncertain, causing most foreign LL.M. candidates to apply to join the New York State Bar, which offers more reliability and a recognized international brand. Currently, the number of foreign lawyers seeking to take the Texas bar exam remains extremely low. In a typical year, between 10 and 20 foreign-educated applicants sit for the Texas bar exam, compared to approximately 4,000-plus foreign applicants who sit for the New York bar exam. California typically has approximately 600

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foreign lawyers per year registered to sit for its bar exam. The current arrangement effectively allows New York to serve as the de facto bar for the country's entire foreign lawyer community, and these bar dues all flow to Albany (not to mention the greater economic impact for New York lawyers from expanded use of New York law).

## **How Adoption of the Reforms Will Help Texas Lawyers**

The reforms will position the Texas legal community to take advantage of its strengths in key economic areas (e.g., energy, technology, transportation, manufacturing, etc.) and better compete for and attract lucrative crossborder legal work. They would enable lawyers in the state to better compete with New York, California, and national and international law firms for coveted international transactional, litigation, and administrative work by offering clients access to foreign legal systems from their Texas platforms. Companies based in the state would also benefit by being able to retain foreign legal talent (whether licensed in Texas or as FLCs) to support their cross-border trade and investment operations. In addition, law schools based in the state would also benefit from an expected increase in enrollment for their LL.M. programs.

# The LL.M. Market for International Lawyers

The ability of foreign lawyers to sit for the Texas bar exam depends significantly on ABA-accredited LL.M. programs<sup>8</sup> in the United States and the economic model that supports them. Due to the quality of the American law school experience and the desire to have an understanding of the U.S. legal system, talented lawyers from around the world commonly interrupt their law careers after three to six years in order to pursue an LL.M. in the United States and then possibly work as a foreign associate for up to one year before returning home. These foreign lawyers, many of whom speak English as a second language, typically seek to sit for the New York bar exam and return home with that coveted combination of a New York law degree and some work experience with a U.S. firm. These achievements become important and marketable career accomplishments that position them for promotion in their respective law firms, in-house company jobs, or governmental posts in their home country. The U.S. law firms that host them become more competitive in winning cross-border work, gain important ongoing market insight, and develop a loyal set of alumni abroad who are well positioned to work with them or refer them work in the years to come.

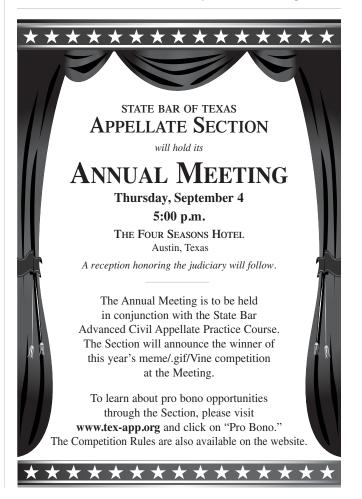
#### **Task Force Recommendations**

The task force's recommendations focus on the following areas: (1) allowing foreign lawyers to sit for the Texas bar exam under rules generally comparable to those used by New York and California; (2) strengthening curricular requirements for LL.M. graduates largely in line with the New York requirements; (3) allowing licensure in Texas based on holding an Optional Practical Training authorization, as is common in New York and California; (4) refining Texas's FLC rules to promote their greater use, ensure appropriate access to privileges and immunities particularly by in-house counsel—and facilitate renewal of FLC certification; and (5) applying Texas's pro hac vice admission rule to foreign attorneys.

# Proposed Rule XIII—Eligibility to Sit for the Bar

Rule XIII addresses, among other things, the standards governing the ability of applicants from foreign jurisdictions to sit for the Texas bar exam.11 Under proposed Rule XIII, foreign lawyers who have received their legal training in a civil law jurisdiction may sit for the bar exam if they have completed a three-year course of study at a law school accredited in a foreign jurisdiction, have an approved LL.M. degree in the United States, and are authorized to practice law in a foreign jurisdiction or in another U.S. state.<sup>12</sup>

In contrast, for lawyers from common law countries, the task force recommended that applicants be eligible to sit for the bar under any of the following routes:



- Applicant must (a) have a degree from a three-year law school accredited in a foreign jurisdiction, (b) be authorized to practice in a foreign jurisdiction or in another U.S. state, and (c) have been actively and substantially engaged in the lawful practice of law for at least three of the last five years;
- 2. Applicant must (a) have completed a two-year course at a law school accredited in a foreign jurisdiction and (b) have an approved LL.M. degree; or
- 3. Applicant must (a) be authorized to practice law in a common law jurisdiction or another U.S. state and (b) have an approved LL.M. degree.

# Proposed Rule XIV—FLCs

An FLC is an attorney who is licensed to practice law in a foreign jurisdiction and certified by the BLE to practice the foreign jurisdiction's law in Texas. An FLC may provide limited consulting services in Texas with respect to the law of the foreign jurisdiction in which the FLC is licensed. FLCs can be a valuable resource to a business or law firm that deals with cross-border transactions, international trade, or other international issues. There are currently 28 FLCs in Texas from the following countries: Argentina, Australia, Colombia, England/Wales, Greece, Mexico, Netherlands, Portugal, Sri Lanka, and Venezuela.<sup>13</sup> The task force concluded that participation in the FLC program could be increased without compromising the integrity of the program by modifying some of the general requirements for FLCs and reducing the administrative burden on the applicants and the BLE while maintaining the BLE's ability to assess applicants' qualifications. 14

#### Rule XIX—Pro Hac Vice Admission

The task force unanimously recommended modifications to existing Rule XIX to allow *pro hac vice* admission for foreign attorneys. This modification can be accomplished by extending *pro hac vice* admission to an attorney licensed in a foreign jurisdiction as well as another state. This recommendation is based on ABA Model Rule 107C on Pro Hac Vice Admission, which the ABA House of Delegates adopted in February 2013 as part of the ABA Commission on Ethics 20/20. <sup>15</sup> But the task force's proposal is different from the Model Rule 107C to the extent that it carries over existing Rule XIX's requirements for the lawyer admitted *pro hac vice* to work with Texas counsel and petition the applicable court for *pro hac vice* approval.

#### Curricular Changes

Given the importance of the LL.M. degree to these reforms, the task force also examined the LL.M. curric-

ular requirements and proposed strengthening these in several ways. The recommended changes in this area include the following:

- Requirement to complete coursework consisting of:
  - (a) Professional Responsibility (2 credit hours);
  - (b) American Legal Studies (2 credit hours); and
  - (c) Legal Research, Writing, and Analysis (2 credit hours);
- Requirement to successfully complete six credit hours in other courses tested on the Texas bar exam; and
- iii. Completion of at least 24 credit hours must be in the U.S.

These recommendations closely track the updated New York rule<sup>16</sup> and, to an extent, the ABA Model Rule 107C.<sup>17</sup>

#### **Conclusion**

The task force unanimously concluded that the proposed reforms would generate a variety of benefits for the state of Texas including: (1) improvement of Texas's position in the globalized economy; (2) improved access by Texas businesses to international legal resources, international markets, and foreign lawyers; (3) extension of the BLE's oversight of a broader population of foreign attorneys who are believed to be working in Texas and outside the regulatory system; (4) creation of a more transparent regulatory system whereby foreign attorneys are registered and licensed in Texas, pay regular bar dues, take CLE courses, and are subject to Texas ethics rules; (5) facilitation of the handling of transactions and cross-border disputes by allowing foreign attorneys to work in Texas as required to meet client needs; (6) provision of a mechanism for foreign attorneys to develop ties and loyalties to the state of Texas and the State Bar of Texas; and (7) improvement of consumer choice and fostering of competition in the cross-border legal services market. 18 TBJ

# **NOTES**

- The opinions expressed in this article are of the author and do not necessarily reflect
  the opinions of the Texas Supreme Court, State Bar of Texas, Texas Board of Law
  Examiners, Texas Unauthorized Practice of Law Committee, or Haynes and Boone.
- Texas's top trading parties are, in fact, quite geographically diversified and include countries from Asia, Europe, and Latin America. A recent example of the importance of foreign direct investment is the decision of Toyota to move its U.S. headquarters to the Dallas-Fort Worth area.
- See Texas Economic Development & Tourism website at www.governor.state. tx.us/ecodev/.
- See Task Force Report on International Law Practice in Texas (December 2012), p. 29-30.
- 5. I have been asked about the potential for distortions of the Texas legal labor market (consisting of approximately 95,000 licensed Texas attorneys) stemming from the improved eligibility of foreign lawyers to sit for the Texas bar exam, and I am confident that the impact is overwhelmingly positive. The benefits to the state are significant and include the establishment of long-term personal and commercial relationships for Texas with well-trained and bright young lawyers who are likely to go on to hold leadership positions in their home countries, where they have the advantage of common language, family and friends, and culture. To my knowledge, neither New York nor California has experienced material labor tortions stemming from their rules, and in fact have also benefited. Moreover, one would expect that it would take Texas numerous years to overcome a long-standing policy of having a relatively closed system for admission of foreign lawyers.

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Moreover, the general career track contemplates two years in the United Statesone for study and one year of training in a law firm willing to hire the candidate. In addition, the bar exam passage rate for these candidates has historically been lower than their JD counterparts due in part to linguistic and cultural reasons. As a result, only a small percentage of these foreign lawyers are able to obtain employment for the OPT year and the vast majority would then return home where their best professional opportunities exist.

- A common misperception is that international law is only for large law firms and companies and that small and mid-sized law firms would not benefit from crossborder trade and commerce. However, my sense is that the reforms would also benefit small and mid-sized law firms in the state who see cross-border opportunities, but are restrained by outdated, ambiguous, or burdensome bar rules and have less resources and familiarity to overcome them than larger firms.
- Foreign associates working in the U.S. typically serve as a legal, cultural, and linguistic bridge or intermediary and assist clients to better understand local law and culture, rather than a resource on U.S. law. They typically work with their home country law firms on important matters within their home country.
- Tuition for LL.M. programs is substantial. For example, the University of Texas School of Law, considered one of the best values in American legal education, offers an international LL.M. program. For the 2013-2014 year, foreign applicants applying as non-residents pay an estimated USD \$63,060 for tuition, room and board, books, and related expenses, and the law school website notes that scholarships and financial aid are generally not available. The UT law school website also notes that the LL.M. incoming class has 47 students from 17 countries. Foreign law firms sometimes offer their best lawyers a form of financial assistance to study abroad, and obtaining an LL.M. is viewed as a rite of passage for partners in prominent foreign law firms in many parts of the world.
- It is relatively easy to transition from an educational visa to an Optional Practical Training work authorization. OPTs are not, however, available for self-employment, and if foreign lawyers wish to remain beyond that one-year OPT authorization period, they would have to convince their employers to typically obtain on their behalf an H-1B visa, which is subject to annual caps, requires a significant advance application period in order to have a viable chance without job interruption, and costs approximately USD \$5,000 in legal and filing fees. In my experience, only a tiny and exceptional minority of the foreign lawyers who come to the U.S. either wish or are able to find employment beyond the OPT work experience. Moreover, due to the relatively small job market for attorneys with an LL.M., only a small minority of LL.M. graduates get the opportunity to work in the U.S. on a long-term basis.
- The proposed Texas rules are still less open than New York's rules (at least as to law graduates of common law legal systems as described below) and rely more on

licensing in a foreign country rather than foreign legal studies (albeit typically with an LL.M. for civil law country candidates). Under the proposed rules, eligible lawyers from common law countries with practice experience in three out of the past five years actively and substantially engaged in the lawful practice of law would also be eligible to sit for the bar exam. This is the only practice requirement in the proposed rules. Practice requirements can be a greater barrier to eligibility than one might imagine, as every link in the chain of employment during the applicable period must be documented. This level of documentation is often timeconsuming for the applicant and the regulatory body administering the rule.

- 11. Under certain circumstances, Texas rules allow admission without examination for lawyers licensed in another state who hold a JD. Although some members favored it, the task force did not recommend such admission for a foreign lawyer with an LL.M. degree and a New York Bar license, for example.
- 12. These requirements are in addition to general rules for all applicants for the Texas bar exam, including but not limited to passing character and fitness background checks. Common law candidates must also meet these other requirements.
- 13. For more information on FLCs registered in Texas, see http://www.texasbar.com/AM/ Template.cfm?Section=Foreign\_Legal\_Consultants.
  In contrast, as of March 2013, California has 55 FLCs from 27 countries. See
- http://admissions.calbar.ca.gov/Requirements/ForeignLegalConsultantsFLC.aspx.
- 15. See article published in ABA Journal online entitled "Model Rule Change Guides Judges Considering Pro Hac Vice Admission for Foreign Lawyers," dated February 11, 2013.
- 16. See New York Rule 520.6, entitled "Study of law in foreign country; required legal education."
- 17. In this area, the task force preferred the slightly more flexible approach of the New York rules and also weighed the need to stay competitive with the de facto market leader.
- 18. See Final Task Force Report on International Law Practice in Texas, p. 52.

#### **LARRY B. PASCAL**

is a partner in the Dallas office of Haynes and Boone and served as the chair for the Texas Supreme Court Task Force on International Law.

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