



BUSINESS LAW SECTION

THE STATE BAR OF CALIFORNIA

BLS – 2005 – 08

TO: Larry Doyle, Chief Legislative Counsel, State Bar of California

FROM: Business Law Section Alternative Dispute Resolution Committee
Jerome A. Grossman, Vice Chair-Legislation - Executive Committee

DATE: July 28, 2004

RE: Amendment of California International Arbitration and Conciliation Act (the “Act”) by addition of Code of Civil Procedure §1297.194 to permit appearances by non-U.S. attorneys in international arbitrations conducted under the Act.

SECTION ACTION AND CONTACTS:

Section: Business Law Section
Committee: Committee on Alternate Dispute Resolution

DATE OF APPROVAL:

Ad Hoc Committee on ADR: March 26, 2004
Section Executive Committee: July 16, 2004

VOTE:

For: 12 Against: 0
For: 15 Against: 0

CONTACTS:

Ad Hoc Committee on ADR Dixon Q. Dern 1801 Avenue of the Stars #701 Los Angeles, CA 90067 Tel: (310) 557-2244 Fax: (310) 557-2224 Email: dixlaw@aol.com	Section Executive Committee Jeffrey C. Selman Heller Ehrman White & McAuliffe LLP 275 Middlefield Rd Menlo Park CA 94025 3506 Tel: (650) 324-7196 Fax: (650)324-6625 (fax) Email: jselman@hewm.com
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DIGEST:

The Act presently contains provisions, namely §§ 1282.4 *et seq.*, that permit an attorney licensed in a state other than California to appear in a proceeding in California upon filing and acceptance of a *pro hac vici* application as outlined in the Sections. There is no comparable *pro hac vici* provision—and in fact no provision—allowing foreign (i.e. non-U.S.) attorneys to be able to appear in international arbitrations that are conducted in California under the Act. The proposed amendment to the Act would allow parties to international arbitrations in California to be represented by the attorney of their choice, including non-U.S. attorneys, but provides that if an attorney who is not licensed as such in California appears for a party in such proceeding, such attorney shall not furnish legal advice as to the effect of California law (if the same is applicable)

other than such advice as may be furnished through an attorney licensed in California whose services have been retained by such party.

BACKGROUND AND HISTORICAL PERSPECTIVE:

On April 21, 1987, Assembly Bill 2667 was introduced in the California Legislature by Assemblyperson Lucy Killea; the bill was based substantially on the UNCITRAL Model Law for international arbitration. It was passed by the Assembly on September 9, 1987 and by the Senate on February 25, 1988, and signed by the Governor on March 8, 1988. At the time, it was extolled as a “first” among state arbitration acts and was cited as a strong incentive to encourage parties to use California as the venue to settle international business disputes. The procedures set forth in the Act are quite flexible, adapting to needs of international parties. The Act provides not only for international arbitration but also for international conciliation (a form of mediation that can result in a settlement agreement that can be entered as a binding award).

In 1998, the California Supreme Court came down with its opinion in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119, 70 Cal Rptr 2d. 304 (1998). The case concerned the construction of §6125 of the California Business and Professions Code which states that “No person shall practice law in California unless the person is an active member of the State Bar.” The issue presented was whether an out-of-state law firm, not licensed to practice in California, violated this section when it performed legal services in California for a California-based client, thus depriving it of the right to collect fees for work done in California. In reversing the Circuit Court of Appeals ruling, the Court held that the defendant law firm had engaged in unauthorized practice of law. As noted in Justice Kennard’s dissent, most of the activity in which the firm engaged dealt with preparation for arbitration of a dispute between their client and other parties.

Although California law has had provisions for appearances of counsel *pro hac vici* by non-California attorneys, there was no provision dealing specifically with arbitration. In response to the outcry against *Birbrower* by the alternative dispute resolution community and others, the Legislature, soon after the decision, amended, §1284.4 of the CCP to add provisions permitting of a counsel *pro hac vici* procedure for out of state attorneys appearing in arbitrations in California. The provisions affect all types of commercial arbitration other than those under collective bargaining agreements (as to which the statute makes clear that any attorneys may appear in such labor proceedings, whether or not licensed in California). The Statute specifically states that “In enacting the amendments to this section... it is the intent of the Legislature to respond to the holding in *Birbrower v. Superior Court* (1998) ... to provide a procedure for nonresident attorneys who are not licensed in this state to appear in California arbitration proceedings.” However, nothing was said regarding non-U.S. attorneys.

Clearly in response to the criticism of *Birbrower*, in 2003 the California Supreme Court established an Advisory Task Force on Multijurisdictional Practice I to study the issues raised by multijurisdictional practice and to render a report in the summer of that year. That report has been rendered and can be found at www.courtinfo.ca.gov/reference/documents/finalmjprept.pdf. Four recommendations were made that would ease the rules with respect to multijurisdictional practice, namely (i) exemptions for in-house counsel, (ii) exemptions for public interest counsel, (iii) certain exemptions for attorneys in California for only transactional matters, and (iv) certain exemptions for litigation attorneys in California during the before or during the pendency of an application for counsel *pro hac vici* status. We are advised by the Judicial Council, which is

responsible for finalizing the draft of the rules, that the rules are nearly ready for presentation and will not, in any event, touch on the issue of non-U.S. attorneys as presently drafted. The question as to how the Rules might be implemented, to extent inconsistent with the Statute, remains unanswered at this stage

In a recent proceeding a French attorney attempted to appear in an arbitration under Act in California, but opposing counsel moved for his removal on grounds that his appearance would constitute unauthorized practice of law. In response to a request for counsel *pro hac vici* status, the State Bar advised this attorney that it had no authority under the Act to process such an application.

A recent Illinois Circuit Court case, *Colmar v. Fremantlemedia North America* (no cites yet available), contains a thorough discussion of the proposed ABA multijurisdictional practice rules and the law of other jurisdictions. Ironically the case involves a question as to whether a California lawyer appearing in Illinois engaged in unauthorized practice of law. In discussing *Birbrower*, the Court opted for a more open multijurisdictional policy and stated in part “We recognize that the court in Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 17 Cal. 4th 119, 949 P. 2d 1, 70 Cal. Rptr. 2d 304 (1998) recently arrived at a conclusion different from that in Williamson. Birbrower involved a New York law firm retained in New York by New York and California corporations to conduct arbitration in a contract dispute governed by California law. The court found that the firm engaged in the unauthorized practice of law in California by virtue of this conduct. However, both the Restatement and ABA Commission have criticized Birbrower as creating too harsh a result. We agree and, therefore, decline to follow it.”

PURPOSE AND APPLICATION:

From a review of the background outlined above, it is clear that California, although claiming to be a hospitable place for international arbitrations, has in fact created a barrier to international trade in legal services that will certainly discourage parties from choosing California as a venue to the detriment to California’s reputation as a leader in international commerce.

The failure of the California Legislature and the apparent failure of the Court in its rule making procedure to cure this defect in the Act needs to be corrected.

As described in the Digest above, the purpose of introducing such an amendment to the Act will be to “plug” a hole in the Act which obviously has not come to the attention of legislators or the Court. The proposal makes eminent good sense. The whole idea of international arbitration is to present the parties with a forum where they can present their case in their own way with their own representatives. Curiously, in dealing with the conciliation portion of the Act, the Legislature got it right. § 1297.351 provides that “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.” Although, admittedly, there are differences between conciliation and arbitration, nevertheless, it would appear that the lack of some provision for appearances by non-U.S. attorneys is an oversight in the legislation that needs correction,

Although corrective language could be placed in §1282.4 (a) —the section dealing with the rights of parties to be represented by counsel—this section is not a part of the Act dealing with international arbitration as such. Additionally the modifications of that section enacted by the

Legislature to permit out of state attorneys to appear in California arbitrations will “sunset” on December 31, 2005 unless renewed.

Rather than placing corrective language in the general arbitration provisions, we recommend inclusion of a new section as a part of the Article 2 dealing with Determination of Rules of Procedure, namely a new section to be identified as §1297.194.

PENDING LITIGATION OR LEGISLATION:

We are not aware of any pending litigation which would impact this proposal.

LIKELY SUPPORT OR OPPOSITION:

Attempts to establish more open rules for multijurisdictional practice have been support by numerous groups including various groups representing corporate and in-house counsel.

Those supporting enhancing world trade and the removal of trade barriers.

The ABA in its model rules is supportive of multijurisdictional practice.

It would seem that none of these groups would have any motive to limit their support to the practice of U.S. attorneys and could be relied on for support of this proposal.

Because the section deals with arbitration proceedings and not court proceedings there is no reason to believe that the Conference of Judges or other groups representing the judicial branch would have any great concern with the matter.

Presumably a segment of the Bar may object on the grounds, asserted in *Birbrower*, that any practice such as this (even in arbitration) leads to unauthorized practice of the law; however, the Legislature apparently did not buy that argument when it limited *Birbrower*.

FISCAL IMPACT:

None

ATTACHMENTS:

Exhibit A – Present text of §1282.4

Exhibit B – Proposed §1297.351

Exhibit A

CURRENT LAW

1282.4. (a) A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title. A waiver of this right may be revoked; but if a party revokes such waiver, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.

(b) Notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that the attorney, if not admitted to the State Bar of California, timely files the certificate described in subdivision (c) and the attorney's appearance is approved by the arbitrator, the arbitrators, or the arbitral forum.

(c) Prior to the first scheduled hearing in an arbitration, the attorney described in subdivision (b) shall serve a certificate on the arbitrator or arbitrators, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney. In the event that the attorney is retained after the first hearing has commenced, then the certificate shall be served prior to the first hearing at which the attorney appears. The certificate shall state all of the following:

- (1) The attorney's residence and office address.
- (2) The courts before which the attorney has been admitted to practice and the dates of admission.
- (3) That the attorney is currently a member in good standing of, and eligible to practice law before, the bar of those courts.
- (4) That the attorney is not currently on suspension or disbarred from the practice of law before the bar of any court.
- (5) That the attorney is not a resident of the State of California.
- (6) That the attorney is not regularly employed in the State of California.
- (7) That the attorney is not regularly engaged in substantial business, professional, or other activities in the State of California.
- (8) That the attorney agrees to be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California.
- (9) The title of the court and the cause in which the attorney has filed an application to appear as counsel pro hac vice in this state

or filed a certificate pursuant to this section in the preceding two years, the date of each application, and whether or not it was granted.

(10) The name, address, and telephone number of the active member of the State Bar of California who is the attorney of record.

(d) Failure to timely file the certificate described in subdivision (c) or, absent special circumstances, repeated appearances shall be grounds for disqualification from serving as the attorney of record in the arbitration in which the certificate was filed.

(e) An attorney who files a certificate containing false information or who otherwise fails to comply with the standards of professional conduct required of members of the State Bar of California shall be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of the arbitration.

(f) Notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, an attorney who is a member in good standing of the bar of any state may represent the parties in connection with rendering legal services in this state in the course of and in connection with an arbitration pending in another state.

(g) Notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, any party to an arbitration arising under collective bargaining agreements in industries and provisions subject to either state or federal law may be represented in the course of, and in connection with, those proceedings by any person, regardless of whether that person is licensed to practice law in this state.

(h) Nothing in this section shall apply to Division 4 (commencing with Section 3201) of the Labor Code.

(i) (1) In enacting the amendments to this section made by Assembly Bill 2086 of the 1997-98 Regular Session, it is the intent of the Legislature to respond to the holding in *Birbrower v. Superior Court* (1998) 17 Cal.4th 117, as modified at 17 Cal.4th 643a (hereafter *Birbrower*), to provide a procedure for nonresident attorneys who are not licensed in this state to appear in California arbitration proceedings.

(2) In enacting subdivision (g), it is the intent of the Legislature to make clear that any party to an arbitration arising under a collective bargaining agreement governed by the laws of this state may be represented in the course of and in connection with those proceedings by any person regardless of whether that person is licensed to practice law in this state.

(3) Except as otherwise specifically provided in this section, in enacting the amendments to this section made by Assembly Bill 2086 of the 1997-98 Regular Session, it is the Legislature's intent that nothing in this section is intended to expand or restrict the ability of a party prior to the decision in *Birbrower* to elect to be represented by any person in a nonjudicial arbitration proceeding, to the extent those rights or abilities existed prior to that decision.

To the extent that Birbrower is interpreted to expand or restrict that right or ability pursuant to the laws of this state, it is hereby abrogated except as specifically provided in this section.

(4) In enacting subdivision (h), it is the intent of the Legislature to make clear that nothing in this section shall affect those provisions of law governing the right of injured workers to elect to be represented by any person, regardless of whether that person is licensed to practice law in this state, as set forth in Division 4 (commencing with Section 3200) of the Labor Code.

(j) This section shall be operative until January 1, 2006, and on that date shall be repealed.

1282.4. (a) A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title. A waiver of this right may be revoked; but if a party revokes the waiver, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.

(b) This section shall become operative on January 1, 2006

Exhibit B

PROPOSED LEGISLATION

SECTION 1. Section 1297.194 is added to the Code of Civil Procedure, to read:

[NEW] 1297.194. In any arbitration proceeding or hearing under this title any party may appear in person or be represented or assisted by any person of that party's choice. A person assisting or representing a party need not be a member of the legal profession, but if such person holds himself or herself out as an attorney, such conduct shall be considered unauthorized practice of law in California. If an attorney who is not licensed as such in California appears for a party in any such proceeding or hearing in arbitration, such attorney shall not furnish legal advice as to the effect of California law (if the same is applicable in such matter) other than such advice as may be furnished through an attorney licensed in California whose services have been retained by such party (but who need not appear), and violation of this requirement shall be considered as unauthorized practice of law in California by such attorney who is not licensed in California. If either party determines during the proceeding or hearing in arbitration to engage an attorney licensed in California, the other party is entitled to a reasonable continuance for the purpose of also procuring the services of any attorney licensed in California.