

AGENDA ITEM

161 MAY

DATE: May 2, 2013

TO: Members, Stakeholder Relations Committee
Members, Board of Trustees

FROM: Robert Hawley, Deputy Executive Director

SUBJECT: Potential Legislative and Other Actions – Hosting International Arbitrations in California

EXECUTIVE SUMMARY

The Board of Trustees is asked here to endorse the concept of potential legislation and other vehicles designed to facilitate conducting international commercial arbitrations in California.

BACKGROUND/DISCUSSION

In 1988, the California Legislature enacted a comprehensive international arbitration and conciliation statute based on the UNCITRAL [United Nations Commission on International Trade Law] Model on International Arbitration [http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html], positioning California to become a major center for international commercial conciliation and arbitration. [California Code of Civil Procedure Sections 1297.11 *et seq.*] A goal of the statute was to foster and support California as a center for international arbitration and conciliation and promote the use of California's resources in this area. [See *e.g.*, Albert S. Golbert & Daniel M. Kolkey, *California's Adoption of a Code for International Commercial Arbitration and Conciliation*, 10 Loy. L.A. Int'l & Comp. L. Rev. 583 (1988), available at <http://digitalcommos.lmu.edu/ilr/vol10/iss3/4>].

International commercial arbitration, a specialized field distinct from domestic arbitration, provides a means of international dispute resolution for businesses involved in international transactions and is favored for its perceived procedural flexibility and the enforceability of the resulting arbitral award in most international jurisdictions. California's robust, international economy and the concentration of large global businesses here occupying positions of global leadership make California an ideal venue for international commercial arbitration and conciliation. The economic benefits of being a center for international commercial arbitration are broad-based and distributed across the state's economy ranging from an increase in business for California's international lawyers and supporting experts, translators, stenographers,

and other professionals and staff) to an increase in business for hotels, restaurants, and other aspects of the business sector.

After the enactment of California's international arbitration and conciliation statute, and before the intended benefits of the statute could fully accrue, the California Supreme Court ruled in a case of some notoriety at the time, that an attorney's participation as an advocate in a domestic arbitration proceeding within California constituted the "practice of law" which, under Business & Professions Code Section 6125, is restricted to active members of the State Bar of California. [See, *Birbrower, Montalbano, Condon & Frank v. Superior Court*, (1988) 17 Cal. 4th 119.] The *Birbrower* case involved New York attorneys who assisted a California-based client with a California-based arbitration proceeding in California. The client refused payment to the New York lawyers for their work preparing for arbitration and the lawyers sought payment through the courts. The California Supreme Court ultimately decided that the New York lawyers were not entitled to payment as they had engaged in the unauthorized practice of law while serving the client in California.

Not surprisingly, this had a significant "chilling" effect on attorneys outside California coming to California to participate as advocates in arbitration proceedings. As a result of the impact of the *Birbrower* decision on arbitrations venued in California, the Legislature crafted Code of Civil Procedure Section 1282.4. This is a *pro hac vice*-like procedure that allows out-of-state attorneys to serve as advocates in California arbitration proceedings if they register in a manner similar to the *pro hac vice* procedures used by civil and criminal courts. The focus of this legislative solution to *Birbrower's* holding was upon advocates in domestic arbitrations as the *Birbrower* decision itself exempted international arbitration and conciliation from its holding based on California's international arbitration act.

In 2004, responding to the growing reality of cross-border practice in the United States, the California Supreme Court adopted, amended and updated multi-jurisdiction practice rules that provide various ways for U.S. out-of-state but not "foreign") lawyers to be specially admitted in California. [See, California Rules of Court 9.40 *et seq.*] The focus of this, again, was on domestic lawyers. Nevertheless, as a result of these initiatives, the international arbitration community concluded that California's initial receptiveness to international arbitrations had turned into hostility. Although this view is understandable, it is not accurate.

There remains strong California policy support for venuing international commercial arbitration and conciliation proceedings in California, which is not contradicted by the California Supreme Court's holding in *Birbrower*. Although the Court held that a lawyer appearing for a client in domestic arbitration proceedings was practicing law in California under Business & Professions Code Section 6125, the Court expressly distinguished advocacy in international arbitration proceedings from its holding by noting:

“The Legislature has recognized an exception to section 6125 in international disputes resolved in California under the state’s rules for **arbitration** and conciliation of international commercial disputes. (Code Civ. Proc., § 1297.11 et seq.) This exception states that in a commercial conciliation in California involving international commercial disputes, “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. (Code Civ. Proc., § 1297.351.)” [Emphasis added].

Birbrower, Montalbano, Condon & Frank v. Superior Court, (1988) 17 Cal.4th 119, 130-31.

“As noted (*ante*, at pp. 130-131), these rules specify 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. (Code Civ. Proc., § 1297.351.)” [Emphasis added].

Birbrower, Montalbano, Condon & Frank v. Superior Court, (1988) 17 Cal. 4th 119, 133. The Court similarly excepted labor arbitration from its ruling in *Birbrower*.

The view that California remains hostile to international arbitration comes from the Court’s reliance on California’s International Commercial Arbitration and Conciliation statute to hold 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,” creating an ambiguity in that the cited Code of Civil Procedure Section 1297.351 appears in Title 9.3 [Arbitration and Conciliation of International Commercial Disputes] under Chapter 7 [Conciliation], not in Chapter 5 [Manner and Conduct of Arbitration] . This has led the international arbitration community to fear that despite the legislative intent of Title 9.3 that is reflected in the holding of *Birbrower*, the literal language of Title 9.3 could be limited to international conciliations and not extended to arbitrations in California, putting attorney fees at risk in any international arbitration conducted by an out-of-state attorney. This was an unfortunate misinterpretation of the intent of Title 9.3. The Court’s holding in *Birbrower*, noted above, welcomed advocates to California to conduct both international arbitrations and conciliation proceedings, consistent with the international arbitration statute.

As a result of this ambiguity in Title 9.3, parties to international commercial agreements, all of which include arbitration dispute resolution clauses, have chosen to venue their arbitrations outside of California, and in Singapore, Hong Kong, Beijing, Shanghai, London, Munich, as well in New York and other U.S. jurisdictions where this ambiguity is not of concern.

The absence of international arbitrations in California works to the disadvantage of all California stakeholders. The interpretation of California law is “outsourced” to foreign venues. Higher costs are imposed upon California parties to international commercial arbitration agreements who must travel elsewhere to participate in international arbitration proceedings. California’s legal, business and hospitality industries are deprived of the opportunity to service this business sector.

The intent of Title 9.3 was to lead California to become a major center for international commercial arbitration. *Birbrower* did not undercut this. The goal here is to assure that California law promotes this policy as originally intended. The trend nationally in the U.S. aligns with this goal as evidenced by the American Bar Association, the Conference of Chief Justices and U.S. states seeking to loosen restrictions on cross border practice.

ISSUE

Whether the Board of Trustees should recommend that California’s international arbitration and conciliation statute be amended to add language to Title 9.3 of the California Code of Civil Procedure to rectify the ambiguity noted above to expressly effect the language of *Birbrower* 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

Whether the Board of Trustees should resolve to endorse and promote California as a favored venue for international arbitration and conciliation proceedings.

CONCLUSION

This proposal recommends that that the State Bar endorse amendments to California’s international arbitration and conciliation statute to add language to Title 9.3 of the California Code of Civil Procedure to rectify the ambiguity noted above and expressly state 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, consistent with the Supreme Court’s holding in *Birbrower, Montalbano, Condon & Frank v. Superior Court*, (1988) 17 Cal.4th 119, and endorse and promote California as a favored venue for international arbitration and conciliation proceedings.

FISCAL / PERSONNEL IMPACT:

None. Any actions required will not be charged against State Bar General Fund revenues.

RULE AMENDMENTS:

The State Bar should request the Supreme Court to amend Rule of Court 9.43 [Out-of-State Attorney Arbitration Counsel Program] to conform to the clarification made here.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

Assuming the Stakeholder Relations Committee and Board of Trustees agree with the proposal described above it is recommended that the following resolutions be adopted.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Stakeholder Relations Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Stakeholder Relations Committee recommends that the Board of Trustees endorse amendments to California's international arbitration and conciliation statute to add language to Title 9.3 of the California Code of Civil Procedure and amendments to other authorities as necessary to expressly state 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, consistent with the Supreme Court's holding in *Birbrower, Montalbano, Condon & Frank v. Superior Court*, (1988) 17 Cal.4th 119, and it is

FURTHER RESOLVED, that the Stakeholder Relations Committee recommends that the Board of Trustees endorse and promote California as a favored venue for international arbitration and conciliation proceedings.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board concur with the Stakeholder Relations Committee's recommendation, the following resolution would be in order:

RESOLVED, that upon the recommendation of the Stakeholder Relations Committee, the Board of Trustees endorses amendments to California's international arbitration and conciliation statute to add language to Title 9.3 of the California Code of Civil Procedure and amendments to other authorities as necessary to expressly state 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, consistent with the Supreme Court's holding in *Birbrower, Montalbano, Condon & Frank v. Superior Court*, (1988) 17 Cal.4th 119, and it is

FURTHER RESOLVED, that upon the recommendation of the Stakeholder Relations Committee, the Board of Trustees endorses and promotes California as a favored venue for international arbitration and conciliation proceedings.