Opening Up to International Arbitration

Imagine that two companies, based in Connecticut and Japan, are negotiating an international trade agreement. If international arbitration becomes necessary to resolve a dispute under the agreement, they expect to use their trusted outside counsel, respectively based in New York and Tokyo. Although the Japanese attorneys have participated in New York arbitrations, they are wary of arbitrating in the Connecticut company's preferred venue. A vice president at the Japanese company suggests California, where both companies have conducted extensive business, and both sides concur that the state's position between the parties' headquarters would be an ideal location. The vice president muses that he always has wanted to walk across the Golden Gate Bridge and take a drive down that famous curvy street.

Having never drafted an international arbitration clause with San Francisco as the venue, the companies' attorneys investigate the prospect. They discover that, starting in 2011, neither company's attorneys will be able to practice in California-based international arbitrations.

YUVAL MILLER is a litigation associate in the San Francisco office of Munger, Tolles & Olson. His practice focuses on complex commercial litigation and international dispute resolution. He is the Executive Editor of the *World Arbitration & Mediation Review*.

Unlike New York and other arbitration centers, California has failed to become a prominent venue for international arbitration - largely due to an accident of legislative history. In 1988, after the Legislature's enactment of Assembly Bill 2667, based on the UNCITRAL Model Law for International Arbitration, some predicted California would be the next center for international arbitration. See California Code of Civil Procedure Section 1297.11 et seq (Arbitration Act or Act). The Act was lauded as a first among state arbitration acts and cited as a strong incentive to use California as a venue. It was passed "[i]n order to reduce the unnecessary burden on the courts, and the resulting delay in the resolution of international commercial disputes." 1988 Cal. Legis. Serv. page no. 106, 121 (West).

In 1998, however, the California Supreme Court held that that an attorney's participation in an arbitration conducted in California constitutes the "practice of law," which under California Business and Professions Code Section 6125 is restricted to active members of the California State Bar. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119 (1998). The Court invited the Legislature to craft an exception to Section 6125 that would allow attorneys who do not meet this restriction to participate in domestic arbitration proceedings.

M. ANDERSON BERRY is an associate in the trial practice group at Jones Day in San Francisco, where he focuses on complex civil litigation and international arbitration issues. He is the Assistant Managing Editor of the *World Arbitration & Mediation Review*.

In immediate response to this holding, and to prevent arbitrations pending in the state from grinding to a standstill, the Legislature accepted *Birbrower's* invitation and passed California Code of Civil Procedure Section 1282.4, which allows attorneys licensed in other United States jurisdictions ("out-of-state attorneys") to represent parties in California arbitrations (subject to complicated admission procedures in which repeat players are discouraged).

Section 1282.4 makes no mention of foreign attorneys or international arbitration. This omission may stem from dicta in *Birbrower.* Although the Supreme Court recognized that Section 6125 limited foreign-attorney participation in *domestic* arbitration, the Court construed Section 6125 as inapplicable to international arbitration. It opined in dicta that, under California Code of Civil Procedure Section 1297.351, "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." However, Section 1297.351 facially applies only to international *conciliations*: Although that section appears under the title heading *"Arbitration and Conciliation of International Commercial Disputes"* (i.e., Title 9.3 of the California Code of Civil Procedure), it is contained within Chapter 7 of that title, which deals solely with "Conciliation." Indeed, dicta earlier in *Birbrower* describes Section 1297.351 as applicable "in a commercial conciliation," and does not mention arbitration.

Section 1297.351 was not squarely at issue in *Birbrower,* and thus the Court's conclusions about that section are not binding. As such, foreign attorneys apparently remain barred from practicing in California international arbitrations. Similarly, out-of-state attorneys face the rigorous and complicated admissions procedures imposed by Section 1284.2. Thus, in order to retain their preferred counsel, foreign parties to international commercial agreements have a strong incentive to designate a jurisdiction other than California for arbitration. As a result, California - the largest economy in the United States - has lagged far behind New York in developing a robust international arbitration community, as well as the tourism and business opportunities that come with one.

In 2011, Section 1282.4 will expire, and out-of-state attorneys will be barred from practicing in California-based international arbitrations. Thus, the coming year presents a unique opportunity to amend California law to make clear that both foreign and out-of-state attorneys may represent parties to international arbitrations in the state. Such clarification would publicize to the world California's advantages as a center for international arbitration.

Both the California State Bar and the American Bar Association have endorsed proposed legislation that would have this effect, but they have not mustered the momentum to pass legislation. See Business Law Section, State Bar of California, Report BLS-2005-08 (July 28, 2004) (BLS Proposal) (approved by the Board of Governors of the California State Bar); ABA Model Rule for Temporary Practice by Foreign Attorneys, ABA Comm. on Multijurisdictional Practice, Report 201J to the House of Delegates (August 2002) (Model Rule). Political momentum should be built in the coming year so that California meets its potential in this field.

In order to accommodate international arbitrations (and arbitration clauses) like the one contemplated in our hypothetical above, the International Law Section of the Bar Association of San Francisco (BASF-ILS) has proposed two alternative legislative amendments (in addition to a renewed Section 1282.4 for domestic arbitrations) that would amend California's Arbitration Act.

First, BASF-ILS recommends confirming as law *Birbrower's* dicta that the Section 1297.351 of the Arbitration Act allows foreign and out-of-state attorneys to practice in international arbitration.

Alternatively, BASF-ILS suggests that the Legislature enact a new Section 1297.197 to the Arbitration Act, which would include a provision allowing parties to be represented by any attorney who is a member in good standing of a recognized and regulated U.S. or foreign Bar Association.

BASF-ILS further proposed that, if either of the alternative proposals be enacted, the Supreme Court amend California Rule of Court 9.43 to substantively mirror the ABA Model Rule for Temporary Practice by Foreign Attorneys. Indeed, the alternative suggestion's "good standing" requirement is substantially identical to Subsection (b) of the Model Rule.

If these proposals are implemented, our hypothetical companies would be able to arbitrate in San Francisco. They might use their preferred counsel, but probably would employ California-based arbitrators and local support services. Both parties likely would choose California attorneys to handle related matters in local courts, or for consultation on points of state law. Of course, the growth of an experienced, specialized international arbitration community in California eventually would make it less expensive and more effective for companies simply to hire California counsel for all of their arbitral needs - indeed, international arbitrations in New York, where foreign counsel are freely permitted, have no dearth of New York counsel. In anticipation of this new business, California law firms would recruit experienced counsel and build their international arbitration practices to better serve existing and potential clients.

Indeed, the benefits of opening California to international arbitration would accrue not only to California's legal community, but also to its tourism industry and (through applicable taxes) to the state itself. Law schools in or near the state would expand their international arbitration curricula, and their students would no longer have to choose between practicing in the field and living in California. Most importantly, however, companies like those in our hypothetical could plan to arbitrate in California, where the Japanese vice president would finally have a chance to cruise down Lombard on the way to a sunset off the Golden Gate Bridge.

Letter to the Editor

Congressional Budget Office's Report Said Reforms Implemented Nationwide Would Reduce Deficit By Billions

Jeffrey Lowe's column, *"Tort Reform 'Savings' Ring Hollow"* (Dec. 30, 2009) on tort reform and the federal health care proposal was remarkable - for what it left out.

He failed to mention the report issued only last October by the nonpartisan Congressional Budget Office, which concluded that reforms including already-tested limits on malpractice jury awards, a statute of limitations on malpractice claims, and replacing joint-and-several liability with a fair-share rule, if implemented nationwide, could reduce total federal budget deficits by $54 billion over 10 years.

Mr. Lowe must have been aware of the Congressional Budget Office, because he cites the office's five-year-old report on medical malpractice costs. He raises that report's estimate of a 2 percent cost saving, which he dismisses as representing "only" $3.6 billion out of $2.3 trillion in total health care spending.

Even allowing for a portion of these legal-related totals going to legitimate compensation for patients, the billions still going into wasteful litigation and defensive medicine would buy, for example, a huge number of vaccines and medicines for our children for many years to come.

John H. Sullivan
President, Civil Justice Assoc. of California