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A Call to Action: Turning the Golden State into a Golden Opportunity for International Arbitration

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I. INTRODUCTION

We were once asked to advise on whether another jurisdiction was categorically better suited for international arbitration than California. The other jurisdiction was an UNCITRAL Model Law jurisdiction. Our first reaction was that there would be differences, but nothing that categorically rules out California; but we were wrong. We found out that, unintentionally, California does not allow foreign attorneys to represent their clients in international arbitration conducted in California. Amidst both renewed efforts to make California a more likely seat of international arbitration and a legislative opening to revise this aspect of the law, change in the latter makes the former both possible and likely.

In 2011, the current California Code of Civil Procedure Section 1282.4 expires. At that point, out-of-state attorneys will join foreign attorneys in their inability to appear as counsel in international arbitrations in California. This is truly unfortunate, as Section 1282.4 is the only legislation—limited that it may be—enabling non-California counsel to participate in international arbitration in California. It provides procedures by which out-of-state attorneys can complete certification that enables them to participate in California arbitrations. Section 1282.4 never went far enough, however, as foreign attorneys are not allowed even these limited avenues of involvement. For California to join its sister states, like New York, Delaware, Florida, Georgia, New Hampshire, Pennsylvania, and Virginia, that attract international arbitration, international

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attorneys and international arbitrators, legislation must be adopted in California that not only renews Section 1282.4, but goes farther, both by streamlining the procedures by which out-of-state counsel can participate in international arbitrations in California and by inviting foreign counsel to appear under the same requirements.

This Article highlights the challenges facing California in its efforts to become a center of international arbitration, provides examples of legislation for the California Bar and California State Legislature to consider, and suggests various avenues by which to bring California more fully into the international legal community.

II.
THE CURRENT ARBITRAL LANDSCAPE IN CALIFORNIA

A. Out-of-State Attorneys

The ability of attorneys who are not members of the State Bar of California to act as counsel in private commercial international arbitrations is governed by California Code of Civil Procedure Section 1282.4 and California Rules of Court, Rule 9.43. These laws were passed expressly to respond to *Birbrower v. Superior Court* "to provide a procedure for nonresident attorneys who are not licensed in this state to appear in California arbitration proceedings."[1]

Birbrower, Motalbana, Condon & Frank, P.C., a New York law firm, advised a California corporation in California on various matters and in preparation for a private arbitration under the auspices of the American Arbitration Association in San Francisco.[2] Upon settlement of the case, the California client sued Birbrower for malpractice; Birbrower counterclaimed and included a claim for fees.[3] The trial court held that Birbrower, by advising clients in California with attorneys not licensed with the California Bar, had committed the unauthorized practice of law, thus violating Business and Professions Code Section 6125, and therefore its fee agreement was unenforceable.[4]

On appeal, the California Supreme Court considered Birbrower's request for the creation of an "exception to *section 6125* for work incidental to private

1. CCP § 1282.4(i)(1) *available at* http://www.aroundthecapitol.com/code/getcode.html?file=./ccp/01001-02000/1282-1284.3. The Code of Civil Procedure was amended by Assembly Bill No. 2086 of the 1997-98 Regular Session and became operative on January 1, 2001.

2. Birbrower, Motalbano, et al. v. Superior Court of Santa Clara County, 17 Cal. 4th 119, 124-25 (Cal. 1998).

3. *Id.* at 126.

4. *Id.*

arbitration or other alternative dispute resolution proceedings."[5] It also considered case law out of New York determining that an arbitral tribunal is not a court of record and its fact-finding processes are not similar to court proceedings, and thus representing a client in arbitration is not the unauthorized practice of law.[6] The Court ruled, however:

> We decline Birbrower's invitation to craft an arbitration exception to *section 6125*'s prohibition of the unlicensed practice of law in this state. Any exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law.[7]

It dismissed the New York precedent as having limited weight as the *Birbrower* attorneys did not spend their California time "in arbitration."[8] The California Supreme Court therefore affirmed the lower court's finding of a violation of Section 6125, and its ruling that the fee contract was therefore unenforceable with respect to its local services.[9]

In response to the problems highlighted in *Birbrower*, the California Rules of Court were amended in 2007 to state at Rule 9.43 that an attorney who is not a member of the State Bar of California, but is a

> member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory or insular possession of the United States, and who has been retained to appear in the course of, or in connection with, an arbitration in this state

may participate in a private arbitration so long as he or she "[h]as served a certificate in accordance with the requirements of Code of Civil Procedure section 1282.4 on the arbitrator, arbitrators, or the arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration...," as well as attained the approval of his or her appearance by the arbitrator, arbitrators, or the arbitral forum.[10]

California Code of Civil Procedure 1282.4 was amended to allow for the representation by out-of-state attorneys in California arbitrations, provided that

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5. *Id.* at 133.

6. *Id.* (*citing* Williamson v. John D. Quinn Const. Corp., 537 F.Supp. 613, 616 (S.D.N.Y. 1982)).

7. *Id.* at 133-34.

8. *Id.* at 133.

9. *Id.* at 140. Justice Kennard dissented, arguing that, "under this court's decisions, arbitration proceedings are not governed or constrained by the rule of law; therefore, representation of another in an arbitration proceeding, including the activities necessary to prepare for the arbitration hearing, does not necessarily require a trained legal mind." *Id.* at 146 (Kennard, J., dissenting).

10. 2009 California Rules of Court, Rule 9.43(a) (Rule 9.43 amended and renumbered effective January 1, 2007; adopted as Rule 983.4 by the Supreme Court effective July 1, 1999). All California Rules of Court cited in this Article are *available at* http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_9.pdf.

such attorneys file a certificate (in a form prescribed by the State Bar of California) with the State Bar of California and all parties and counsel, exhibiting the arbitrator's approval of his or her appearance in writing. In addition to various information on the out-of-state attorney, the certificate must also list an active member of the State Bar of California who is acting as the attorney of record.[11]

Proper certification by the out-of-state attorney, however, does not ensure her ability to participate as counsel in a California-sited arbitration. Upon the completion of all requirements established under the code, "[t]he arbitrator, arbitrators, or arbitral forum *may* approve the attorney's appearance."[12] In addition, repeat players are discouraged: "In the absence of special circumstances, repeated appearances shall be grounds for disapproval of the appearance and disqualification from serving as attorney in the arbitration in which the certificate was filed."[13]

B. Foreign Attorneys

Although authorizing the access of *out-of-state* attorneys to international arbitrations in California, these laws do not permit the participation of *foreign* attorneys as counsel in the same venues.[14] The California State Bar's Office of Special Admissions and Specializations confirms that *all counsel* participating in private arbitrations "physically in California," even those of an international nature, *must be licensed in a United States state or territory*.[15] The California State Bar states that a foreign attorney may participate in a private international commercial arbitration in California only with the assistance of local counsel, and such foreign counsel would not be able to speak before or during the hearing and may otherwise be restricted, though the actual scope of the possible participation of foreign counsel would ultimately be determined by the forum.[16]

The inability of foreign attorneys to participate in California arbitrations is underscored by California's multi-jurisdictional ("MJP") practice rules. "New California Rules of Court 9.45, 9.46, 9.47 and 9.48 permit certain categories of attorneys not licensed in California ("non-California attorneys") to practice [in

11. CCP § 1282.4(b),(c).

12. CCP § 1282.4(d).

13. *Id.*

14. From conversations with Daryl McKenzie, California State Bar's Office of Special Admissions and Specializations, Oct. 2 and 9, 2007. There are four exceptions to this rule: (1) in disputes arising from collective bargaining agreements (CCP § 1282.4(h)); (2) with respect to worker's compensation (CCP § 1282.4(i)); (3) in international conciliation (CCP § 1297.351); and (4) by way of ratified treaties or conventions that specify parties may be represented by persons of their choice. *See Birbrower*, 17 Cal. 4th at 146 (Kennard, J., dissenting).

15. Conversations with Daryl McKenzie, Oct. 2 and 9, 2007, *supra* note 14.

16. *Id.*

California] to a limited extent."[17] The Rules include arbitration under the definition of formal legal proceedings in which out-of-state attorneys may temporarily be involved in certain circumstances, but the State Bar states explicitly that attorneys licensed only in foreign countries are *not* eligible to practice under the MJP rules. "The only eligible attorneys are those who are active members in good standing of the bar of at least one U.S. state, territory, jurisdiction, possession or dependence."[18] Similarly, California's *pro hac vice* provisions limit benefits to attorneys licensed in a United States state, territory or insular possession.[19]

California does have a "Registered Foreign Legal Consultant Program" by which a foreign attorney is allowed to participate in California in the limited role of a "Registered Foreign Legal Consultant" to "provide legal advice in California limited to the law of the foreign country in which he or she is licensed to practice law."[20] Such attorney must be

> admitted to practice and [] in good standing as an attorney or counselor at law or the equivalent in a foreign country; and [have] a currently effective certificate of registration as a Registered Foreign Legal Consultant from the State Bar.[21]

Such consultants are able to render legal services in California but, notably, are not allowed to "[a]ppear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers..." or "[o]therwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any other jurisdiction other" than the foreign jurisdiction in which he or she is licensed to practice.[22] Presumably because of the very narrow nature of this participation, very few attorneys are actually on the list of Registered Foreign Legal Consultants with the California State Bar.[23]

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17. THE STATE BAR OF CALIFORNIA, MULTIJURISDICTIONAL PRACTICE PROGRAM, FREQUENTLY ASKED QUESTIONS, Answer to Question no. 1, *available at* http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=12441&id=14964.

18. *Id.* Answer to Question no. 11. Under California Rules of Court, Rule 9.47(a)(1) and (c), out-of-state attorneys may participate in "anticipated but [] not yet pending" formal legal proceedings—including arbitrations—in California "in which the attorney reasonably expects to be authorized to appear."

19. California Rules of Court, Rule 9.40.

20. OFFICE OF SPECIAL ADMISSIONS AND SPECIALIZATION, STATE BAR OF CALIFORNIA, "FOREIGN LEGAL CONSULTANT PROGRAM" (Feb. 2007) at 4, *available at* http://calbar.ca.gov/calbar/pdfs/certification/FLC-Brochure.pdf.

21. California Rules of Court, Rule 9.44(a) (former Rule 988).

22. *Id.* Rule 9.44(d)(1), (5).

23. *See* STATE BAR OF CALIFORNIA, LEGAL CONSULTANTS LIST, *available at* http://www.calsb.org/state/calbar/calbar_generic.jsp?cid=10163&id=1306 (as of Mar. 31, 2010, there were only 50 attorneys listed as consultants).

In a final note, it should be mentioned that, although *Birbrower* highlighted important deficiencies for the California arbitral community, with respect to foreign attorneys, it also spawned much confusion with inconsistent dicta. Specifically, the Court relied on Civil Procedure Section 1297.351 in Chapter 7 on Conciliation of the California International Arbitration and Conciliation Act ("the Act") to state that, "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., § 1267.351*)."[24] This interpretation is, however, inconsistent not only with the code itself, which provides that the parties to a dispute *submitted to conciliation*, "may appear in person or be represented 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,"[25] but also with the Court's earlier dicta in which it explains "[t]his exception [to section 6125 prohibiting the unauthorized practice of law] states that in a commercial *conciliation* in California involving international commercial disputes," the parties may be represented by any person of their choice.[26] Notably, no mention is made under the six previous chapters of the Act governing arbitration regarding who may represent parties to arbitration.

III.
LOOKING TO NEW YORK AND THE MODEL RULE FOR GUIDANCE

A. New York

On the other end of the spectrum from California's current legislative environment is New York's. Permitting probably the most extensive participation of foreign attorneys in arbitration, federal case law out of New York holds that participation in arbitration is not actually the practice of law and therefore parties can be represented by a lawyer from another jurisdiction and even possibly by a non-lawyer.[27] In the seminal case of *Williamson v. John D.*

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24. *Birbrower*, 17 Cal. 4th at 133.

25. California International Arbitration and Conciliation Act, Chapter 7 – CONCILIATION, Article 2 REPRESENTATION AND ASSISTANCE, § 1297.351 Choice of parties; Qualification.

26. *Birbrower*, 17 Cal. 4th at 130-131 (emphasis added). This inaccuracy has been noted by other jurists: "... the provision in question, CCP § 1297.351, clearly applies only to international *conciliations*. Indeed, the existence of an express exception for international conciliations but not for international arbitrations supports the contrary argument that persons not admitted to the California bar may not act as advocates in international arbitrations in California." Richard A. Eastman (Bernard H. Oxman ed.), *International Decision: Birbrower, Motalbano, Condon & Frank v. Superior Court, 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304. Supreme Court of California, January 5, 1998, modified February 25, 1998,* 94 A.J.I.L 400, 404 (2000) (internal citations omitted) (emphasis in original).

27. *See generally* Williamson v. John D. Quinn Construction Corp., 537 F.Supp. 613, 616

Quinn Construction, the district court for the Southern District of New York noted four differences between arbitration and litigation: (1) an arbitral tribunal is not a court of record; (2) arbitral rules of evidence and procedures differ from courts of record; (3) arbitral fact finding is not equivalent to judicial fact finding; and (4) arbitration does not have provisions for admission *pro hac vice*.[28] The court thus noted:

> While no case precisely in point has been found either under New York or New Jersey law, the issue has been addressed by the Association of the Bar of The City of New York. Although the report focused on labor arbitration, it considered generally the issue of legal representation before arbitration tribunals. The report states '(it) should be noted that no support has to date been found in judicial decision, statute or ethical code for the proposition that representation of a party in any kind of arbitration amounts to the practice of law.' The report concludes 'the Committee is of the opinion that representation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.' Quinn has cited no case nor has the Court's independent research disclosed any to the contrary.[29]

If participation in arbitration is not the practice of law, any person doing so cannot run afoul of New York Judicial Law § 478, which prohibits the practice of law "without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath."[30] Therefore, a foreign attorney should be permitted admission to an arbitration in New York State without difficulty.

If, however, there proves to be any problem with admission upon the argument that arbitration is not the practice of law, a foreign attorney may be able to apply for admission *pro hac vice* from a court with jurisdiction under the equally liberal New York Code Rule and Regulations § 602.2.[31] This code section specifically provides for the *pro hac vice* admission of *foreign* attorneys and counselors. Section 520.11 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors of Law additionally states that:

> [a]n attorney and counselor-at-law or the equivalent, who is a member in good standing of the bar of another state, territory, district *or foreign country* may be admitted *pro hac vice*: (1) in the discretion of *any* court of record, to participate in *any matter* in which the attorney is employed; . . .[32]

(S.D.N.Y. 1982).

28. *Id.*

29. *Id.* (quoting Committee Report, Labor Arbitration and the Unauthorized Practice of Law, The Record of The Association of the Bar of The City of New York, Vol. 30, No. 5/6, May/June 1975).

30. N.Y. Jud. Law § 478 (Judiciary Law. Article 15. Attorneys and Counselors), *available at* http://law.justia.com/newyork/codes/judiciary/jud0478_478.html.

31. 22 NYCRR § 602.2.

32. Part 520. Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, § 520.11(a) (emphasis added), *available at* http://www.courts.state.ny.us/ctapps/520rules.htm#11.

There is one restriction on the otherwise unfettered access of foreign attorneys into New York: in order to participate in "pre-trial or trial proceedings," the temporary admission under this latter provision requires association of a New York attorney who shall be the attorney of record in the matter.[33]

New York also allows for the admission of foreign attorneys to its Bar without examination in certain circumstances. Section 520.10 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law provides that,

> [i]n its discretion, the Appellate Division may admit to practice without examination an applicant who: . . . (1)(ii) has been admitted to practice as an attorney and counselor-at-law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law;

and has practiced in that jurisdiction in five of the seven years immediately preceding the application.[34] This provision, however, includes a reciprocity requirement: the foreign attorney petitioning for admission must be currently admitted in at least one jurisdiction that "would similarly admit an attorney or counselor-at-law admitted to practice in New York State to its bar without examination."[35]

Finally, New York—like California—also provides for the licensing of foreign "legal consultants."[36] The Appellate Division of the Supreme Court of New York, at its discretion, may license to practice as a legal consultant, without examination, "a member in good standing of a recognized legal profession in a foreign country" who has engaged in the practice of law for three of the five years immediately preceding the application.[37] Like California's, this provision is unlikely to be helpful with respect to the majority of disputes in that a foreign legal consultant may not

> appear for a person other than himself or herself as an attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission *pro hac vice* pursuant to section 520.11 of this Title).[38]

In addition, foreign legal consultants are precluded from rendering "professional legal advice" on the law of New York or the United States, except based on the

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33. *Id.* § 520.11(c).

34. *Id.* § 520.10(a).

35. *Id.* § 520.10(a)(1)(iii).

36. *See generally* Part 521. Rules of the Court of Appeals for the Licensing of Legal Consultants, *available at* http://nycourts.gov/ctapps/521rules.htm.

37. *Id.* § 521.1(a)(1) and (2). The applicant must also possess good moral character and general fitness, be over 26 years of age, and intend to practice as a legal consultant in New York and maintain an office for that purpose. *See id.* § 521(a)(3)-(5).

38. *Id.* § 521.3(a).

advice of a qualified New York attorney.[39]

B. *Model Rule for Temporary Practice by Foreign Attorneys*

In August of 2002, the American Bar Association ("ABA") adopted the proposed Model Rule for Temporary Practice by Foreign Attorneys.[40] Under the Model Rule, a lawyer who is admitted only in a non-United States jurisdiction,

> [D]oes not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the lawyer performs services in this jurisdiction that:
> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;[41] . . .
> (3) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;[42] ...
> or
> (5) are governed primarily by international law or the law of a non-United States jurisdiction.[43]

On April 12, 2010, the ABA released the most recent results of a survey it conducts periodically of the various states to determine to what level they have implemented the ABA MJP Recommendations.[44] The sixth and last provision surveyed was that of the temporary practice of foreign lawyers. According to this survey, only six states had adopted a rule allowing the temporary practice of foreign attorneys: Delaware, Florida, Georgia, New Hampshire, Pennsylvania, and Virginia.[45] Three additional states had recommended new rules, but they were still pending: Louisiana, Mississippi, and Washington, D.C. Nineteen states had the MJP recommendation under consideration, but did not currently have a rule: Alaska, Arkansas, California, Hawaii, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, North Dakota, New York, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, and Washington. Another twenty-one

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39. *Id.* § 521.3(e).

40. ABA Comm. on Multijurisdictional Practice ("MJP"), Report 201J to the House of Delegates (Aug. 2002), *available at* http://www.abanet.org/cpr/mjp/201j.pdf.

41. *Id.* at 1, 3 (stating that this language is identical to that in proposed Rule 5.5(c)(1) of the ABA *Model Rules of Professional Conduct* for lawyers admitted in a United States jurisdiction).

42. *Id.* (explaining that this language parallels proposed Rule 5.5(c)(3)).

43. *Id.* at 1.

44. AMERICAN BAR ASSOCIATION, STATE IMPLEMENTATION OF ABA MJP RECOMMENDATIONS (Apr. 12, 2010), *available at* http://www.abanet.org/cpr/mjp/recommedations.pdf (hereinafter "ABA Survey").

45. *Id.* In addition, North Carolina appears to permit the temporary practice of foreign attorneys by omitting the term "U.S. jurisdiction" from its Rule of Professional Code. *See* Summary of State Action on ABA MJP Recommendation 8 & 9, prepared by Professor Laurel Terry on 9/26/09 based on information contained in a chart prepared by the ABA Center for Professional Responsibility, dated 9/23/09, *available at* http://www.abanet.org/cpr/mjp/8_and_9_status_chart.pdf.

states declined to address adoption of the recommendation all together. They include: Alabama, Colorado, Connecticut, Idaho, Kansas, Kentucky, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Jersey, New Mexico,[46] Oklahoma, Rhode Island, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming. Finally, only one state, Arizona, had considered the recommendation and declined its adoption.

IV.
TRANSFORMING CALIFORNIA INTO AN INTERNATIONAL ARBITRAL CENTER

First, it should be noted that the California State Bar has previously attempted to shift the cool reception currently afforded out-of-state, and especially foreign, attorneys. A 2005 report of the Alternative Dispute Resolution Ad-Hoc Committee of the State Bar of California Business Law Section proposed an amendment to the California International Arbitration and Conciliation Act to add a civil procedure code section explicitly to allow foreign attorneys access to international arbitrations in California.[47] This report states that, although the provisions drafted by the legislature in response to *Birbrower* permit an out-of-state attorney access into California, "[t]here is no comparable *pro hac vici* [sic] 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."[48] The report additionally notes the discrepancy between arbitration and conciliation: "Curiously, in dealing with the conciliation portion of the Act, the Legislature got it right."[49] As support for its proposed amendment, the Committee cites to a proceeding in which a French attorney was removed from an arbitration under the Act upon the argument of opposing counsel that his appearance would constitute the unauthorized practice of law.[50] When the French attorney applied for *pro hac vice* status, the State Bar advised him that it had no authority under the Act to process such an application.[51]

The 2005 Report was a proposal for legislation to be submitted in 2005.[52] Following a period of public comment, it was submitted to and its submission

46. New Mexico, however, does allow for foreign attorneys to apply for *pro hac vice* status. *See* ABA Survey, *supra* note 44, at 24.

47. *See* BUSINESS LAW SECTION, STATE BAR OF CALIFORNIA, REPORT BLS-2005-08 (July 28, 2004), *available at* http://calbar.ca.gov/calbar/pdfs/legis/BLS-8.pdf.

48. *See id.* at 1.

49. *Id.* at 3 (*citing* CCP § 1297.351).

50. *Id.*

51. *Id.*

52. Such proposals typically have an acceptance rate by the Legislature of approximately 80%. October 2007 discussion with Steven K. Hazen, Advisor, then Vice-Chair for Legislation of the State Bar of California Business Law Section.

was approved by the Board of Governors of the California State Bar. Legislation was not actually proposed, however, as the MJP Recommendations were currently being discussed and the issue was also under consideration by the California Supreme Court.[53]

The most expeditious avenue for the acceptance of foreign attorneys in international arbitrations sited in California may be to push for the adoption of the Model Rule for Temporary Practice by Foreign Attorneys. The language is already provided, it is uniform and the momentum is building slowly among states.[54] However, as this rule has been in legislative limbo for years, it may be difficult to sway California to a speedy adoption.

Therefore, the better route may be to push for a renewal of California Civil Procedure Section 1282.4 on January 1, 2011 (or hopefully before). At that time, section (b) can be rewritten to include three small words with enormous effect: "an attorney admitted to the bar of any other state *or foreign jurisdiction* may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that" the attorney satisfies the requisites listed.

To make California even more attractive to international arbitration while stopping short of deeming the participation in arbitration to not constitute the practice of law (the practice of New York, but most likely unattainable on the warmer coast), the list of requirements for such attorneys could also be reduced and streamlined. In addition, the language of section (d) whereby the arbitrator(s) *may* approve the attorney's appearance upon compliance with the stated requirements, should be replaced with mandatory language.

Finally, the second half of section (d) that states that repeated appearances of an attorney, in the absence of special circumstances, shall be grounds for disapproval of appearance and disqualification must be removed from the legislation. In its place should be a provision for the exact opposite: a program should be established similar to that of the Foreign Legal Consultants, whereby foreign attorneys can be certified for a period of time (preferably a lengthy one) by the completion of the requirements under section (c) to practice as counsel in international arbitration in California. Therefore, they would need to qualify only once and thereafter their right of appearance would be assured. This will not only encourage counsel to bring subsequent international arbitration to California but will also provide a ready list for arbitral parties seeking counsel already qualified to represent their interests here.

In addition to changes to Section 1282.4, California Code of Civil Procedure Section 1297.11 *et seq.* (California International Arbitration and Conciliation Act) should also be amended as suggested in a proposal recently

53. *Id.*

54. The momentum is slow, however, as only Virginia has joined the ranks of States adopting temporary practice rules in the last two years.

endorsed by the Bar Association of San Francisco ("BASF").[55] The proposal offers the addition of a new Section 1297.197 to Chapter 5 of the Act (Manner and Conduct of Arbitration). This new section, entitled "Choice of parties; qualification," would enable a party to be "represented or assisted by any person of that party's choice who is a member in good standing of a recognized legal profession (in the United States or a foreign jurisdiction) ..."[56]

Although these changes to the language of the code appear limited and attainable, they belie a much greater effort for their passage, requiring a concerted effort by the California State Bar and a receptive California State legislature. We note that several California firms are working towards making this legislative change a reality, including Munger Tolles & Olson and Jones Day who drafted the above proposal, and O'Melveny & Myers and Gibson, Dunn & Crutcher who have joined in its promotion. We hope that this comment serves as the call to action that it is and that effective change can be brought to California law, making our golden state a golden opportunity for international arbitration.

55. Draft Proposal to the BASF Board from the BASF International Law Section (Jerome C. Roth, Chair) re: Legislative Proposal: Opening California to International Arbitration (Apr. 20, 2010). The proposal was originally drafted and presented by Jerome Roth and Yuval Miller of Munger Tolles & Olson San Francisco, and Caroline N. Mitchell and Anderson Berry of Jones Day San Francisco.

56. *Id.* The requirement of "good standing" is substantially identical to Subsection (b) of the ABA Model Rule for Temporary Practice by Foreign Attorneys.

The Alien Tort Statute: Comments on Current Issues

WITH AN INTRODUCTION BY PROFESSORS RICHARD BUXBAUM & DAVID CARON