

RESOLUTION 11-09-2012

DIGEST

International Arbitrations: Representation by Foreign and Out-of-State Attorneys

Adds Code of Civil Procedure section 1297.182 to allow appearances by out-of-state and foreign attorneys at international arbitrations held in California.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution adds Code of Civil Procedure section 1297.182 to allow appearances by out-of-state and foreign attorneys at international arbitrations held in California. This resolution should be approved in principle because it will help California achieve its potential to become a magnet for international arbitrations, which would benefit California practitioners and the state as a whole, while still imposing on the out-of-state and foreign attorneys the duties of care that California bar members owe to their clients.

International arbitrations typically involve sophisticated parties advised by able counsel who make a considered decision to avoid the courts of law and to resolve their disputes by private arbitration instead. Existing California law, due to sunset on December 31, 2012, allows out-of-state lawyers to appear at such arbitrations only if, among other things, (a) they do so in conjunction with California counsel of record, (b) they certify their good standing with their out-of-state bar, (c) they agree to be bound by California disciplinary rules, and (d) they do not engage in such representation “repeatedly.” (Code Civ. Proc., § 1282.4.) It is unclear whether *foreign* attorneys may represent clients in arbitrations, or only in mediations. (See Code Civ. Proc., § 1297.351; cf. *Birbrower v. Superior Court of Santa Clara County* (1998) 17 Cal.4th 119, 130-131.) Additionally, under current law, the arbitrator has discretion to deny permission to appear, and could presumably do so if a particular practitioner did so “repeatedly,” a standard which is not defined. After December 31, 2012, California international arbitrations will again become completely closed to out-of-state lawyers. As a consequence of the above-referenced restrictions and uncertainties, and despite its importance to the international and especially transpacific economy, California has acquired a reputation of being a place to avoid for international arbitrations. In contrast, jurisdictions such as New York and Singapore liberally allow the parties to use foreign counsel of their choosing, and thus are regularly chosen as the venue for international arbitrations.

The Legislature has already enacted AB 1631, which will repeal the sunset of Code of Civil Procedure Section 1282.4. AB 1631 thus makes permanent the beneficial provisions of the current law, while still protecting the citizens of California. For example, Section 1282.4 will require out-of-state and foreign attorneys to certify their good standing with their home bar governing body, and to agree to submit to California disciplinary rules and to the jurisdiction of

the California courts with respect to malpractice actions and other lawsuits arising from their conduct at the arbitration. The law will therefore impose on such practitioners the duties California attorneys owe to their clients. However, the changes proposed by this resolution are an improvement on those of Section 1282.4, and for that reason it should therefore be approved. Unlike Section 1282.4 this resolution makes clear that foreign attorneys may participate in California international arbitrations. It also ends the need for retention of local counsel, thereby potentially lowering the overall cost of the arbitration to the client. The resolution would thereby do more to further the proponent's goal of making California a more attractive venue for international arbitrations, while still providing basic protections against malpractice for the parties involved.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to add Code of Civil Procedure section 1297.182 to read as follows:

1 § 1297.182

2 Notwithstanding any other provision of law, including but not limited to Business and
3 Professions Code section 6125 or otherwise regarding the practice of law in the State of
4 California, in any international commercial arbitration proceeding or hearing under this title, in
5 which one or more of the parties is not a resident of the State of California, any party may-

6 (a) appear in person; or

7 (b) be represented or assisted by any attorney or counselor of law of that party's choice
8 who is a member in good standing of a recognized legal profession (in the United States or a
9 foreign jurisdiction) and is subject to effective regulation and discipline by a duly constituted
10 professional body or public authority.

11 (c) An individual, who is not a member of the State Bar of California, seeking permission
12 to represent a party in international commercial arbitration proceedings taking place in California
13 must serve within a reasonable time after acceptance of the representation, a certificate in the
14 form prescribed by the State Bar of California on the arbitrator(s) or arbitral forum, the State Bar
15 of California, and all other known parties, or if known to be represented, on their counsel. The
16 representative must request approval to appear from the arbitrator(s) or the arbitral forum, which
17 approval shall be in writing on the certificate.

18 (d) The certificate referred to in subdivision (c) of this Section shall include:

19 (1) The case name and number, and the name of the arbitrator, arbitrators, or arbitral
20 forum assigned to the proceeding in which the attorney seeks to appear.

21 (2) The representative's residence and office address.

22 (3) The courts before which the representative has been admitted to practice and the dates
23 of admission.

24 (4) Whether or not the representative is currently a member in good standing of a
25 recognized legal profession (in the United States or a foreign jurisdiction) and is subject to
26 effective regulation and discipline by a duly constituted professional body or public authority.

27 (5) Whether or not the representative is currently on suspension or disbarred from the
28 practice of law in any jurisdiction.

29 (6) That the representative is not a resident of the State of California.

30 (7) That the representative is not regularly employed in the State of California.

31 (8) That the representative is not regularly engaged in substantial business, professional,
32 or other activities in the State of California.

33 (9) That the representative agrees to be subject to the jurisdiction of the courts of this
34 state with respect to the law of this state governing the conduct of attorneys to the same extent as
35 a member of the State Bar of California.

36 (10) The title of the court and the cause in which the representative has filed an
37 application to appear as counsel pro hac vice in this state or filed a certificate pursuant to this
38 section in the preceding two years, the date of each application or certificate, and whether or not
39 it was granted. If the representative has made repeated appearances, the certificate shall reflect
40 the special circumstances that warrant the approval of the representative's appearance in the
41 arbitration.

42 (e) Failure to timely file and serve the certificate described in subdivision (d) shall be
43 grounds for disapproval of the appearance and disqualification from serving as a representative
44 in the arbitration in which the certificate was filed. In the absence of special circumstances,
45 repeated appearances shall be grounds for disapproval of the appearance and disqualification
46 from serving as a representative in the arbitration in which the certificate was filed.

47 (f) A representative who fails to file or serve the certificate required by this section or
48 files or serves a certificate containing false information or who otherwise fails to comply with
49 the standards of professional conduct required of members of the State Bar of California shall be
50 subject to the disciplinary jurisdiction of the State Bar with respect to that certificate or any of
51 his or her acts occurring in the course of the arbitration.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: California case law requires that legal representatives at international arbitrations held in California be admitted to practice law in California.

This Resolution: This resolution is meant to make California more competitive for international arbitrations while still recognizing that the work is the practice of law.

The Problem: Other states have more liberal rules for representation in international arbitrations, which makes international arbitration in California less competitive than other venues.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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SECTION COMMENTS TO RESOLUTION 11-09-2012

COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION OF THE STATE BAR OF CALIFORNIA

APPROVE IN PRINCIPLE: The State Bar of California's Committee on Alternative Dispute Resolution (ADR Committee) supports this proposal, which would prescribe a process for non-California attorneys (both from other states as well as foreign jurisdictions) to appear in international commercial arbitrations conducted in California.

The proposed legislation is modeled after the provisions of California Code of Civil Procedure Section 1282.4, which prescribes the process for non-California U.S. attorneys to appear on a *pro hac vice* basis in arbitrations conducted in California. Extending a similar process to the international arbitration context would create a structure for the non-California attorney appearances in those arbitrations, and serve to foster the growth of international arbitration in California.

Disclaimer

This position is only that of the State Bar of California's Committee on Alternative Dispute Resolution. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.
