SB 940 (Umberg). Arbitrator Neutrality and ADR Practitioner Certification. Support in part and oppose in part. Chaptered.

SB 940 can be divided into two sections---a revision affecting California ADR practice that, in the author's words, would "help level the playing field in consumer arbitration and preserve arbitrator neutrality" and a certification process for both arbitrators and mediators.

CDRC supported two parts of the section concerning arbitration practice. One of these added Section 1799.208 to the Civil Code and affects both arbitration and litigation. It provides that a seller shall not require a consumer to agree to a provision that would require the consumer to adjudicate outside of California a claim arising in California nor deprive the consumer of the substantive protection of California law with respect to a controversy arising in California. If a contract contains these provisions, the provisions are voidable at the option of the consumer.

The other, denoted as Section 1799.209 of the Civil Code, gives a consumer who has signed an arbitration agreement the option of adjudicating the dispute in Small Claims Court if the amount in controversy is within the monetary limits of Small Claims Court. The original bill limited the option to consumers who signed arbitration agreements that would be administered by a provider. CDRC proposed that the option be extended to consumers who executed non-administered arbitration agreements as well and the author agreed.

The bill also concerns the use of discovery in arbitration. Code of Civil Procedure Section 1283.05 permits general discovery in arbitration, but the statutory language was preceded by the phrase "to the extent provided in Section 1283.1". Section 1283.1 gave these broad discovery rights only to the arbitration of wrongful death and negligence claims. In all other cases, these broad discovery rights were available only if the provisions of Section 1283.05 were incorporated into or made applicable to the arbitration agreement. Given that the rules of JAMS and the American Arbitration Association (AAA) largely permitted broad discovery, such discovery was allowed in most arbitrations administered by JAMS and the AAA, with an exception for agreements that contained discovery limitations in the arbitration clause. SB 940 repealed Section 1283.1 and so it allows the same type of discovery that is available in litigation to be available in arbitration and may very well negate discovery limitations in arbitration clauses. Nevertheless, CDRC believes that this expansion of discovery rights will not have a major effect on arbitration practice because it expects that an advocate who

believes that his or her adversary is abusing the discovery process will bring the matter to the attention of the arbitrator. Arbitrators are often more prone to limit abusive discovery than judges. In addition, the bill retains subsection (e), which only allows depositions after the permission of the arbitrator is obtained.

Section 1281.93(a), a new subsection, limits the ability of an arbitrator to accept a new assignment from an attorney or party in a pending arbitration. In its initial version, Section 1281.93(a) prohibited an arbitrator from accepting or soliciting an assignment to arbitrate a new case from an attorney or party in a pending arbitration unless, prior to the selection of the arbitrator, all parties agreed in writing to allow the arbitrator to do so. CDRC objected to this section, noting that it would be doubtful if parties would even think of this subject prior to the selection process and thus, there was no real exception. The author revised the language, and it now reads: "During the pendency of the consumer arbitration, a solicitation shall not be made of a party to the arbitration or of a lawyer for a party to the arbitration". In administered arbitrations, the arbitrator is usually selected from a list given to the attorneys or parties by the arbitration provider organization. This process is not described in either the bill's definition of "solicitation" nor in the section that describes what is not a "solicitation". Thus, it is not clear whether the bill affects this practice.

The certification portion of the bill took a more tortured path to its final rendition and initially raised many questions. The original bill did not require the State Bar to create a certification program. It merely stated that the Bar "may" do so. Further, the certification program applied only to "firms", but the term "firm" was not defined. Did it only affect providers, or could a single practitioner be considered to be a "firm"? The only requirement for certification was that the firm have procedures in place 1) for persons to file complaints about its arbitrators or mediators, 2) for its arbitrators to comply with the Ethical Standards for Arbitrators in Contractual Arbitrations, 3) for its mediators to comply with the Rules of Conduct for Mediators in Court Connected Mediations, and 4) to remedy failures by its arbitrators and mediators to comply with the aforementioned standards.

CDRC objected to the certification proposal for various reasons. It noted that certification normally implies a certain degree of expertise. Yet a person who had no prior experience with ADR could start a firm, agree to adhere to the four principles denoted above, and become certified immediately.

The certification provision was then amended to cure some of the problems of the original version. Among other things, the amended bill applied to "providers" and "practitioners" in addition to "firms" and largely clarified the coverage issue. In addition, while retaining the requirement to adhere to the four principles, it provides for tiers or levels that "demonstrate higher public protection based on criteria developed by the State Bar". The amendment further *requires* the State Bar to create the program. CDRC opposed the creation of tiers because it believes that it will raise the barriers for entrance to the ADR profession. However, CDRC was not able to induce the author to modify or remove the tier provision. CDRC now plans to work with the State Bar to develop the certification program.

AB 924(Gabriel). Attorney misconduct. Oppose. Withdrawn.

AB 924 required mediators to send complaints against them to the State Bar. To assert a claim, a complainant would be expected to reveal mediation communications and, in doing so, mediation confidentiality would undoubtedly be breached by the mediator once the mediator forwarded the complaint to the State Bar. In addition, a mediator who would be defending himself or herself against a complaint in a State Bar proceeding would either be forced to breach mediation confidentiality if the mediator chose to testify or be unable to defend against the complaint if he or she declined to testify, citing mediation confidentiality. The mediation participant who did not file the complaint and that person's attorney could also be subpoenaed to testify in a State Bar trial of the mediator, even though the participant entered into the mediation in the belief that anything said therein would be confidential and thought that he or she bought peace when the case settled. The bill, if enacted, would have seriously diminished the attraction of mediation because of its inroads on confidentiality. Consequently, CDRC opposed the bill.

AB 924 was introduced during the 2023 legislative session and the author resisted most attempts to amend the bill. CDRC ultimately enlisted the Consumer Attorneys of California and the California Judges Association to join in opposition to the bill. This combined opposition led the author to convert the bill to a two-year bill. That meant that the bill could be reintroduced in 2024. The re-introduction of the bill needed to be done by the end of June. The bill was not re-introduced by the deadline and so it died.

AB 1903 (Maienschein). International Arbitration. Support. Chaptered.

In 1988, the California Legislature enacted the California International Arbitration and Conciliation Act (CIAC), codified as Code of Civil Procedure Section 1297.11 et. seq. The bill conformed to the Model Law on International Commercial Arbitration (the Model Act) that was adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. Prior to CIAC's enactment, most international arbitrations conducted in the United States were held in New York or Washington, D.C., even where one of the parties may have been based in California. After CIAC was enacted, the number of international arbitrations that were conducted in California increased. However, in 2006, substantial amendments were made to the Model Act. California did not follow suit. Consequently, California once again lagged other United States locales, including locales other than New York and Washington, in the number of international arbitrations conducted.

To rectify this situation, the California Lawyers Association organized a task force in 2022 to amend CIAC so that it once again would largely conform to the Model Act. CDRC had a representative on the task force. The bill was drafted in 2023 and introduced as AB 615. It sailed through the Assembly easily and moved on to the Senate, where the Senate Appropriations Committee concluded that the amended statute would negatively affect California's budget. The Committee felt that the state's trial courts would be burdened by motions to confirm or vacate international arbitrations as well as other motions that might emanate from an arbitration and the bill was placed in the suspense file, effectively killing it. The Committee's conclusions were erroneous. Most of the litigation arising from international arbitration agreements is filed in or removed to federal courts because of the

geographical diversity that is inherent in international arbitrations. And so there would be very little effect on the California court system.

In 2024, the task force tried again by introducing AB 1903, which was virtually identical to AB 615 and supported by CDRC. But this time, the bill's proponents made the legislators aware that the bill did not have an impact on California's fiscal status. The bill passed both houses without dissent and was signed by the Governor.

SB 1141 (Niello). Mediation: Amount in Controversy. Not passed.

SB 1141 increased the ceiling to "order" a case into mediation from $50,000 to $150,000. The bill was subsequently amended to include certain conditions precedent that had to be met before the court could do so, including that a case be set for trial and that at least one party notify the court of an interest in mediation. CDRC believes that in many situations, early mediation (prior to trial setting) is appropriate and that a mediation is not likely to settle if only one party is interested in mediating. CDRC did not take a position on the bill because it was working on amending the bill to eliminate the aforementioned conditions.

The bill passed 38-0 in the Senate but died when it was not approved by the Assembly Judiciary Committee.

AB 3281. Assembly Omnibus Bill. Proposed Amendment to Code of Civ. Proc. Section 1281(a). Withdrawn.

Every year, the Legislature passes an omnibus bill. An omnibus bill is supposed to be minor, technical, and non-controversial and is designed to correct typos in an existing statute or bring the statute in line with a law that was subsequently passed. It is not expected to create substantive changes in the law. AB 3281 was the Assembly's omnibus bill in 2024.

Tucked into page 39 of AB 3281 was an amendment to Code of Civil Procedure Section 1281(a), which is the core of the California Arbitration Act (CAA). It is the very first section of the CAA and it states that a written agreement to arbitrate a controversy is valid, enforceable, and irrevocable save upon such grounds that exist for the revocation of any contract.

The proposed amendment provided that Section 1281(a) only applied "if the arbitration agreement is valid, enforceable, and irrevocable under the Federal Arbitration Act (FAA)". Thus, those sections of the CAA that were not found in the FAA would be eviscerated. Most of these sections improve arbitration practice. This was not the type of change normally associated with an omnibus bill.

The legislative analysis that accompanied the bill indicated that the provision on page 39 was based on a comment by the court in *Bissonnette v. LePage Bakeries Park Street LLC,* 49 F. 655

(2d Cir. 2022) that indicated that transportation workers who are exempt from arbitration under Section 1 of the FAA could still be required to arbitrate if the arbitration agreement could be interpreted to be also covered by the state arbitration act and the state act did not have a similar exemption. The CAA does not exempt transportation workers from arbitrating and so the amendment was designed to substantively amend the CAA by creating a transportation worker exemption. But it also would have eviscerated other sections of the CAA such as Section 1281.2(c) (determination of where to try a case when a party or issue is not covered by the arbitration agreement) or Sections 1281.97 and 1281.98 (relief for a consumer or employee if the drafter of the contract fails to pay forum fees).

Regardless of what one thinks about the availability or non-availability of an exemption for transportation workers under the CAA, an omnibus bill is not the place to consider such legislation. CDRC contacted the author of AB 3281 and pointed this out. The language on page 39 was stricken.