

Memorandum No. 19(1960)

Subject: Study #32 - Arbitration

Our consultant's study is forwarded with this memorandum. The questions considered in the study which the Commission must resolve are summarized on pages 73 - 75 of the study. The Commission has already considered many of the questions discussed, as well as some not discussed. Generally, the Commission's conclusions are in accord with the consultant's recommendations. However, the consultant takes a differing position on certain matters which should be reconsidered in the light of the consultant's discussion.

1. At page 8, the consultant recommends that oral arbitration agreements be enforceable under the statute. The Commission previously decided to omit them, but to enforce awards made pursuant to oral agreements.

2. The consultant recommends that the statute include a specific provision stating that common law arbitration does not exist. The Commission has not considered this specific proposal, but has decided the question in principle by deciding that arbitration agreements not within the statute (oral ones) are void.

3. The consultant has recommended that certain questions be included in the statute by specific reference. The proposed statute as drafted (attached as Exhibit I) mentions valuations and appraisals, as recommended, but does not expressly include labor-management agreements. In view of the broad sweep of the scope section of the statute, it is probably unnecessary. The consultant feels that omission of the present reference to labor contracts in the California statute would be sufficient, anyway. (P. 19.)

New matter upon which the Commission may make decisions is discussed beginning on page 28. The Commission may begin considering the items in the summary with Item B (4) on page 73.

Attached to this memo as Exhibit I is a draft of the sections of a proposed arbitration statute dealing with scope and enforcement. Certain matters upon which the Commission has acted, such as notice, were omitted because they will appear in the final statute at a later point.

The matters that may be raised in defense (Section 3 (2)) may appear to be somewhat broad. However, it is no broader than the language in Section 1 which is in the present California statute and the Uniform Act. Interpreting the same language that appears in Section 1, the Second Circuit Court of Appeals has said that the court, on a motion to compel arbitration, should consider any reason which, in equity, would preclude enforcement. (R.F.C. v. Harrisons & Crosfield, 204 F.2d 366, 37 A.L.R.2d 1117 (1953).) The following language appears in the New York statute on appraisals and valuations which was recommended by the New York Law Revision Commission:

The relief provided in this section shall not be granted in any case where defenses interposed and established by the party against whom the relief is sought would require dismissal of an action for damages for breach of the agreement.

This language might be adopted in place of the language suggested.

Two policy matters not discussed in the study should be considered. The proposed statute provides for a stay of judicial proceedings. Should there be an exception for matters within the jurisdiction of the small claims court? An arbitration clause can become an instrument of oppression in small contracts, for it would cost more to arbitrate than the complainant could expect to recover.

Should the provision of the present California statute that arbitrations

enforced under the statute must take place in California be retained? Eddy S. Feldman has pointed out that a Los Angeles Superior Court refused to confirm an award where the evidence had been taken in Los Angeles and submitted to a panel of arbitrators located all over the country. (30 So. Cal. L. Rev. 375, 452, note 318 (1957).)

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT I

Proposed Arbitration Statute

SECTION 1. An agreement to settle by arbitration any question that could be made the subject of a binding contract between the parties, whether the question has arisen at the time of the agreement or may arise in the future, is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. An agreement that any question that could be made the subject of a binding contract between the parties, including but not limited to valuations, appraisals and similar questions, be determined by a neutral third party, or by a neutral third party and one or more other persons, selected or to be selected, is an agreement to settle such question by arbitration within the meaning of this Title.

SEC. 2. An agreement to settle a question by arbitration is void unless it is in writing. An expired written agreement, the term of which has been extended or the provisions of which have been adopted by the oral or implied agreement of the parties thereto is ^{an} agreement in writing within the meaning of this Section. A provision that questions arising between the parties shall be settled by arbitration may be incorporated in a written agreement by reference in the same manner that any other provision may be incorporated in a written agreement by reference.

SEC. 3. (1) A party aggrieved by the failure of another to perform an agreement to arbitrate may, by motion, apply to the Superior Court for an order directing that arbitration proceed in the manner provided in such agreement. The motion shall allege the existence of an agreement to arbitrate, the existence of a question to be settled by arbitration within its terms, and the opposing party's refusal to arbitrate.

(2) The court shall order the parties to proceed to arbitration in accordance with the terms of the agreement unless the opposing party:

(a) denies the existence of the agreement to arbitrate or the existence of a question to be settled by arbitration within its terms,

(b) alleges that the right to seek arbitration has been waived by the moving party, or

(c) alleges any ground for the revocation or rescission of the agreement.

(3) The court shall proceed summarily to the determination of the issues raised under subdivision (2) of this Section and shall order arbitration if found for the moving party; otherwise, the motion shall be denied.

(4) If the court finds that it would be inequitable to require arbitration prior to the determination of other controversies existing between the parties, it may order that the arbitration be stayed until such determination or until such time as it shall specify.

(5) An order for arbitration shall not be refused on the ground that the question in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

SEC. 4. (1) Upon motion, the Superior Court may stay an arbitration proceeding commenced or threatened upon a showing that would be sufficient to cause the court to delay arbitration or to deny a motion to order arbitration under Section 3.

(2) Any action or proceeding involving an issue subject to arbitration shall be stayed by the court in which the action or proceeding is pending only if an order for arbitration or a motion therefor has been made under Section 3, or, if the issue is severable, the stay may be with respect thereto only. If the issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a superior court, the motion to compel arbitration shall be made therein. Otherwise and subject to section _____, the motion may be made in any court of competent jurisdiction.

[The Section referred to in the last sentence is the general venue section.]