

10/18/60

Memorandum No. 92 (1960)

Subject: Study No. 32 - Arbitration

We have received comments and suggestions on the Commission's tentative statute on arbitration from the State Bar Committee on Arbitration and from the American Arbitration Association. In this memorandum, the staff reviews these comments and suggestions and makes recommendations concerning them. The Commission's tentative statute, with changes recommended by the staff, is on the pink pages attached to this memorandum and is designated as Exhibit A. Changes proposed by the staff are shown by underscoring and by strike out type.

Attached to this memorandum on the green pages, designated as Exhibit B, is the Commission's tentative statute as revised by the State Bar Committee on Arbitration. Exhibit B was prepared by the staff after attending a meeting on October 15 with the State Bar Committee. The State Bar Committee has not approved this Exhibit as representing its action but it is believed to accurately represent the views of the State Bar Committee. Our consultant, Sam Kagel, sat in on the meetings of the State Bar Committee and will be at our meeting when we consider this study.

Attached to this memorandum as Exhibit C is a letter from

the American Arbitration Association commenting on the tentative statute prepared by the Commission.

## COMMENTS

### SECTION 1280.

Subdivision (1) is proposed to be amended by the State Bar so that the first line will begin "'Agreement' is not limited to but includes valuation . . . ." The staff believes that this proposal should be worded "'Agreement' includes, but is not limited to, valuations . . . ."

Although the staff does not think that these additional words add any meaning to the subdivision, we have no objection to the amendment in order to make abundantly clear that the enumeration is not exclusive. Although other subdivisions in this section also use the word "includes" no similar amendment to those subdivisions is needed.

Subdivision (2) is objected to by the American Arbitration Association. It does not understand how an agency dealing in arbitration can work with an oral arbitration agreement. The State Bar did not object to this provision.

The staff does not believe the A.A.A. will be overly troubled by this provision. If it doesn't want to accept oral references, it doesn't have to. The staff believes that the provision should be retained.

Subdivision (5). The State Bar has proposed that this subdivision be deleted. The objection of the Committee was that the subdivision might bind the parties to a labor contract to a no-strike - no-lockout agreement as the quid pro quo for the arbitration agreement that continues to exist. This might be well beyond the intent of both the parties. The Committee believed that, if the parties seriously desired to be bound to arbitrate, they could exchange letters extending the agreement on a day to day basis, or for such other period of time as the parties might desire.

The A.A.A., on the other hand, thinks that extended arbitration agreements should be enforceable. It states that doubt as to the existence of the arbitration clause should be removed.

The staff, however, is persuaded by the arguments of the Bar. The status of the parties is quite uncertain when they continue to operate under expired collective bargaining contracts. We do not think that we should include a provision that might bind the parties to obligations they did not believe they had incurred.

SECTION 1281.

The Bar proposes to add to the end of the section the following language: "Common law arbitration is abolished. Arbitration may be compelled and enforced only as provided in this title."

The Commission did not intend to abolish common law arbitration entirely, for there would be no other source of law to determine the obligations of the parties under an oral arbitration agreement. The Commission intended to modify the existing law on oral arbitration agreements -- which is the common law -- to the extent that written awards made pursuant to oral agreements would be enforceable under the statute.

The Bar Committee does not believe that it is desirable to have two sets of rules governing the obligations of the parties under arbitration agreements. It believes that this leads to confusion.

The staff is not aware of any great amount of confusion that has arisen on this subject in California. Only one case involving an oral agreement has reached the appellate courts, and the court had no difficulty in enforcing the award. The Commission's present proposal merely continues the existing law, except that award pursuant to oral agreements will be enforceable under the statute.

The staff believes that to abolish "common law arbitration" while non-statutory oral arbitration exists will lead to confusion. This confusion could be eliminated either by enforcing oral agreements under the statute or by eliminating arbitration pursuant to oral agreements entirely. If it is desirable to abolish arbitration pursuant to oral agreements, the following amendment of Section 1281 is suggested:

1281. A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract. Any such agreement not in writing is void.

SECTION 1282.

The Bar has suggested several amendments to Section 1282.

Subdivision (1). The Bar has suggested that this subdivision be clarified by the addition of the words "such controversy". This alteration would indicate more clearly than does the Commission's draft that the court must determine that the parties agreed to arbitrate the specific matter in dispute. The staff believes the alteration is very desirable and strongly recommends that the suggested amendment be approved.

The Bar has also suggested the addition of language to indicate that an order to compel arbitration may be denied if the petitioner has not complied with the conditions precedent to arbitration. This suggestion is to make it clear that a party to a labor agreement who is seeking arbitration must comply with the grievance procedures contained in the agreement. The staff approves of the suggestion; however, the staff believes the amendment should be drafted as set forth on the pink sheets. Under the staff amendment, a separate subdivision is created to deal with the problem.

Subdivision (2). [Subdivision (3) on the pink] The

Bar has suggested a technical amendmet so that the subdivision will conform to the changes made in subdivision (1). One member of the Bar Committee, though, urged strongly that this subdivision be deleted. He stated that the existing California arbitration law is really not too bad, and the addition of this sentence to the Commission's proposal would make the proposed arbitration law so far inferior to the existing arbitration law that he would seek to oppose it in the Legislature. The Bar Committee approved this subdivision as modified, two members dissenting.

The staff recommends that the subdivision be retained as modified. We believe that the modifications suggested by the Bar will make it clear that the court is not to order arbitration of any question that a party has not agreed to arbitrate. The staff believes, though, that this subdivision is necessary to preclude the possibility that a court might deny an order compelling arbitration of a question the parties agreed to arbitrate merely because the court believes that the contentions of one party are without merit.

Subdivision (4). [Subdivision (5) on the pink] The Bar suggested the addition of an amendment clearly indicating that a threatened arbitration proceeding may be enjoined. This provision was added by the Bar because it desired to make the provisions of this title the exclusive source of law governing arbitration. Some members of the Committee believed that a provision making this title exclusive might mean that an equity

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court could not enjoin a threatened proceeding. Therefore, this provision was included.

The staff recommends the addition of this provision whether or not this title becomes the exclusive source of law governing arbitration proceedings. Because arbitration is a special proceeding governed by special provisions in the code, it is possible that the courts might hold that there is no power to enjoin such proceedings if there is no express authority contained in this title. The Uniform Arbitration Act has a provision similar to this (Section 2(b)), and New York has a similar provision in its arbitration law.

SECTION 1283.

The Bar has suggested the substitution of "controversy" for "issue" throughout this section. The Commission used the word "issue" because it was concerned with questions before a court as distinguished from issues before arbitrators. However, the word "controversy" is defined in Section 1280 and is the term generally used in regard to arbitration. Therefore, the staff has no objection to this change.

The Bar suggests the addition of the words "of this State" after the word "court" in the reference to the courts which have the power to stay an action pending completion of arbitration. The staff does not believe that the words add any meaning to the section, but they do no harm and help to identify the court authorized to make such orders. Therefore, the staff has no objection to the proposed alteration.

The A.A.A. believes that this provision is desirable. It states that "It is dangerous to allow the arbitration agreement to act as a dilatory plea in and of itself." It has suggested two alternatives -- one is the one we have provided, the other is to permit the court to order arbitration on its own motion if an arbitration agreement is set up as a defense. In view of the fact that the Commission has provided that a party must apply for an order to compel arbitration in order to obtain a stay, the latter alternative is unnecessary.

SECTION 1284.

Subdivision (1). The Bar suggests the addition of language to the end of the subdivision to indicate that the court, in appointing an arbitrator, shall act "in accordance with the agreed method to the fullest



extent possible." A corresponding change is suggested in subdivision (2) -- the method provided in subdivision (2) for judicial selection of an arbitrator is to be followed only if the agreed method cannot be followed.

The staff believes that these amendments indicate more clearly the original intent of this section, and the staff recommends their approval.

Subdivision (2). The first amendment is discussed above as it relates to an amendment in subdivision (1). The Bar suggests the deletion of "a" before "private disinterested association" so that the reference to "a governmental agency" will also be modified by the phrase "concerned with arbitration." The Bar did not believe there was any value in obtaining lists of names from governmental agencies unless they are concerned with arbitration. The Bar also recommends the deletion of "by agreement or lot from the nominees." The Bar did not think it appropriate to spell out in the statute how the parties are to select the arbitrator. The Bar also believed that the parties should not be restricted to the list of nominees in selecting the arbitrator.

The staff approves of these changes and recommends their approval.

#### SECTION 1285.

Subdivision (2). The Bar has suggested the amendment of subdivision (2). The suggested amendment would provide that the award shall be rendered by a majority of the arbitrators. The provision in the Commission's draft that the powers of the arbitrators, other than those of the neutral, may be exercised by a majority would be deleted.

The staff believes the suggested amendment would leave a gap in the statute, for the arbitrators as a body have certain powers other than the power to make the award -- such as the power to modify or correct an award.

Under the amendment, it would be uncertain whether a majority could exercise that power. The staff recommends the retention of the original language of the section.

SECTION 1286.

Subdivision (1). The A.A.A. objects to the requirement that service of notice of the arbitration hearing be accomplished by registered or certified mail. It states that service by regular mail has proven sufficient in the practice of both commercial and labor arbitration under A.A.A. rules.

The Bar did not recommend a change. The staff does not. The subdivision is subject to the agreement of the parties, so existing practice under the A.A.A. rules will continue where the parties have agreed to arbitrate under such rules. But, if there is no agreement on notice, the staff believes that registered or certified mail should be used.

Subdivision (2). The Bar recommends the addition of a provision to require the swearing of witnesses if a party requests. The staff believes the suggestion should be approved; however, the staff suggests that the amendment be placed in subdivision (3). The following language is recommended: "On request of a party, the testimony of witnesses shall be given under oath."

Subdivision (4). The A.A.A. objects to the provision that an order compelling arbitration is a condition precedent to a default award. It indicates that this will seriously hamper many interstate arbitrations. The staff does not agree, for the subdivision is subject to the agreement of the parties. If the parties have agreed that default awards may be made against them, no court order will be necessary. If a party has not agreed specifically to be bound by awards made ex parte, the staff does not think

it is an unreasonable requirement to compel the party seeking to obtain an award to obtain an order compelling arbitration.

Subdivision (5). The Bar suggests that the language defining the authority of the neutral arbitrator, when a party arbitrator fails to act, be reworded to provide that the neutral arbitrator may "render the award." The staff believes the suggested language improves upon the existing language which provides that the neutral may "determine the questions submitted." However, the staff believes the Bar's suggestion may be improved further by altering it to read "make the award."

Subdivision (6). The Bar recommends the revision of subdivision (6) to provide that the neutral arbitrator may consider only the matters presented at the arbitration hearing. The Bar, however, would permit the arbitrator to take notice of anything a court may judicially notice under Code of Civil Procedure Section 1875. The staff believes that this proposal is too restrictive. The courts do not regard Section 1875 as providing an exclusive list of the matters that may be noticed. Hence, under the Bar's proposal, an arbitrator would not be able to notice as much as a court may notice. Moreover, the Bar's proposal does not provide the parties with any protection against matters noticed by the arbitrator upon which the arbitrator is misinformed. The Commission's proposal, on the other hand, requires that the parties be informed of any information obtained by the neutral other than at the hearing. Under the existing law, the neutral arbitrator is not restricted in any way as to the information he may obtain. The staff, therefore, recommends the retention of the Commission's provision; however, the word "issues" should be changed to "controversy".

If the Bar's suggestion is approved, the staff believes that it should be reworded as follows:

A neutral arbitrator shall consider and act solely upon the evidence presented at the hearing and upon those facts of which a court may take judicial notice under Section 1875.

SECTION 1287.

The Bar has recommended that, if a person who has waived counsel rescinds his waiver, the other party should be entitled to a reasonable continuance to obtain counsel. The staff believes the recommendation is needed to prevent one party from taking advantage of another's reliance upon an agreement waiving counsel. Therefore, the staff recommends the approval of the Bar's suggestion with some slight modification of language.

SECTION 1288.

Subdivision (1). The Bar suggests that the sentence beginning "Subpenas shall be issued, served and enforced in accordance . . . ." be amended by the deletion of "issued". The staff believes the amendment is proper for the preceding sentence states who shall issue subpenas. The only reference to issuance in the provisions of the Code of Civil Procedure referred to states merely that the officer before whom the witness is to appear shall issue the subpoena. It is unnecessary to pick up this provision by the cross-reference.

Subdivision (3). The A.A.A. wonders why depositions are not to be used for discovery. It does not indicate the reason for its remark, but it may be surmised that it believes depositions should be used for discovery in arbitration proceedings. It has been the belief of the

Commission that if arbitration is to be just like court proceedings, the parties might as well go to court. The advantage of arbitration is its expeditious procedure and finality. If discovery is introduced, the advantages of arbitration will be largely nullified.

Subdivision (4). The Bar has suggested some modification in the language of this subdivision to indicate that witnesses "are entitled to" fees instead of "shall receive" fees. The staff agrees with the suggestion and recommends the approval of the modification.

SECTION 1289.

Subdivision (3). The Bar believes that extensions of time within which the arbitrator may make an award should be in writing. The staff believes the suggestion is a logical extension of the requirement that arbitration agreements be in writing -- for, in effect, the extension is a modification of the arbitration agreement. The staff recommends the modification as suggested, and further recommends that the statute require that the award be made and served within the time limit.

SECTION 1290.

Subdivision (1). The Bar recommends that the period of time within which the arbitrators may modify or correct an award be extended to 30 days. The staff has no objection, and recommends that the modification be approved.

Subdivisions (2) and (3). The Bar recommends the addition of language indicating that service of applications to modify or objections thereto may be made "upon or" before application or objection is made to the arbitrator. The staff has no objection and recommends the approval of the modifications.

Subdivision (4). The State Bar has suggested that a subdivision (4) be added to this section to spell out the duties of the arbitrators upon an application for modification or correction. The staff believes the proposal should be approved in a somewhat different form than that proposed by the Bar.

SECTION 1291.

The Bar suggests that the first line of this section, which provides for the division of arbitration expenses, be modified as follows: "Unless otherwise [~~provided in the agreement to arbitrate~~] agreed to by the parties, . . ." The staff agrees that the division of expenses should be subject to the agreement of the parties whether or not that agreement is expressed in the agreement to arbitrate. Therefore, the staff suggests an amendment that would read as follows: "Unless the parties otherwise agree [~~provided in the agreement to arbitrate~~], . . ."

SECTIONS 1292 - 1295.5.

The State Bar objected to the basic scheme proposed by the Commission for confirming, modifying and vacating awards. The Commission's scheme -- the same as that contained in the United States Arbitration Act -- was that an award had to be attacked, if at all, within 90 days. An award could be confirmed within one year; hence, after the first 90 days, confirmation would be automatic. The Bar objected to any provision for automatic confirmation and objected to any provision cutting off the right to modify or vacate an award prior to the time the right to have the award confirmed expires.

In place of the Commission's proposal, the Bar suggests that the

right to petition for modification, correction or vacation of awards be limited to 90 days. A petition to confirm may be filed within four years. If a respondent wants the court to grant any relief other than that requested in a petition, he is required to file a "response". Such a response may be filed in opposition to a petition to confirm even though the time has expired for filing a petition to modify, correct or vacate the award. The Bar recommended that the court be required to vacate, modify or confirm whenever an award is presented to it -- unless, of course, it dismisses for lack of authority to act on the application.

The Bar further recommended that the procedures in the title on arbitration should be the exclusive procedures for the enforcing or attacking awards. The Bar deleted the provision in the Commission's draft providing for enforcement of unconfirmed awards as contracts.

The Bar objects to automatic confirmation and to the enforceability of unconfirmed awards after the time for attack has expired because it is not always clear who is bound by an award. When the arbitration is conducted by an association on behalf of its members, the extent to which a particular member is bound is sometimes in doubt. A person might believe that he is not bound by a particular award and, therefore, under no particular compulsion to have the award corrected or vacated. After expiration of the time for attack, such a person might find himself named as a respondent in a proceeding to confirm and enforce the award. The Bar believed that such a person should be able to assert the invalidity of the award or to request its modification at that time.

The staff believes that the fears of the Bar are well founded. However, the procedure may be made a little less complex. The staff does not believe

it is necessary to delete the contract provision to obtain the Bar's objective. Eliminating this provision may cause problems with the enforcement of out-of-state awards which are perfectly valid as contracts where they are made. Moreover, the elimination of this provision will generate unnecessary confirmation proceedings, for a person would be compelled to confirm the award because it would be void after the period for confirming it expires. The staff believes that the Bar's objections may be met by providing that statutory objections to an award may be raised as well as the ordinary contract defenses whenever an award is sought to be enforced as a contract. The staff believes that the proposal to make the procedures in the title on arbitration the exclusive procedures for vacating and enforcing awards should not be adopted. Such a provision might be construed to mean that a person would be unable to attack an award or a judgment thereon for fraud after 90 days. The staff does not believe it is wise to cut off the objection of fraud at such an early date. The traditional power of the courts to set aside judgments for fraud should be applicable to judgments upon awards as well as any other judgments. Of course, the statute will apply to everything that is embraced within its terms; but the staff believes it may be dangerous to exclude all other sources of law as authority governing matters not mentioned.

The staff has redrafted these sections to provide the same basic pleading procedures recommended by the Bar. However, under the staff's redraft, the court would have power only to confirm or vacate after the expiration of 90 days. Thus, after the 90-day period, the person who obtained the award will know that it cannot thereafter be modified and is subject to attack only on the limited grounds upon which an award may



be vacated. This is the procedure provided in the New York Arbitration Statute.

In the statute recommended by the staff on the pink sheets, the entire title has been broken up into chapters and the sections have been reorganized. A Section 1291.5 has been added to clarify the procedures to be followed in post-award judicial proceedings.

In addition to the foregoing sweeping revision, the Bar suggested the following specific changes:

SECTION 1292.

The Bar suggested that the court be required to determine that the respondent named in a petition to confirm be a person bound by the agreement to arbitrate. The staff incorporated this provision in its revision to take care of situations arising out of arbitrations conducted by associations on behalf of the members.

SECTION 1293.

Subdivision (3) [Subdivision (2) in the pink.] The Bar recommended the deletion of the reference to the successors of the original arbitrators. The Committee believed the reference created an ambiguity. The staff does not object to the revision and has incorporated it in the revision on the pink sheets.

SECTION 1294.5.

This section is based on a section added by the Bar as a part of its revision. The section provides that the parties may extend the time limits

for filing petitions by agreement. This is the existing law, and the staff approves the revision. The four-year time limit on confirmation was chosen by the Bar because this, roughly, is the statute of limitations on the enforcement of written contracts.

The Bar recommended the addition of a provision prohibiting the filing of any post-award petition until 10 days has elapsed. This is to permit any party to request modification or correction of the award by the arbitrators.

SECTION 1295.

Subdivision (2)

The Bar recommended the deletion of this subdivision, apparently because it objected to the extension of arbitration to controversies involving domestic relations. The objection may have been because the Committee believes there should be no exceptions to the rule that confirmed awards are final.

This subdivision does not extend the scope of arbitration. The subdivision was adopted by the Commission to take care of situations which may arise because the scope of arbitration has been extended by Section 1280 to any question of law or fact. However, the staff does not object to the deletion of the section, for in domestic relations situations, or in child custody disputes, the courts will alter or modify the provisions of previous judgments if the welfare of the persons concerned so requires. Therefore, no great harm will be occasioned by the deletion of the subdivision.

SECTIONS 1296 - 1299.

The Bar also suggested sweeping revisions of these sections to supplement the revisions proposed to Sections 1292 through 1295.5. The staff also recommends extensive revision in accordance with the alterations previously recommended. Under the staff's proposals, these sections would be in a separate chapter entitled General Provisions Relating to Judicial Proceedings.

Other than the revisions made necessary from the changes previously discussed, the following changes have also been suggested:

SECTION 1296.

Subdivision (1). The Bar recommended that jurisdiction over enforcement proceedings be given to the court in the county where the agreement is either to be performed or was entered into. The staff has not objection to the suggestion and has incorporated it in the recommended revision.

New Subdivision (2). A member of the Bar Committee suggested that jurisdiction over enforcement proceedings be given primarily to the court in which an action or proceeding involving the issue is pending. This would obviate the necessity of filing an entirely new proceeding in a different court in order to stay the pending action. All matters could be decided in the one action. There is a similar provision in the Uniform Act.

New Subdivisions (4) and (5). The Bar recommended the addition of provisions indicating that subsequent petitions relating to preliminary matters should be filed where the initial petition was filed and that subsequent petitions relating to post-award procedures should be filed where the initial post-award petition was filed. This is a desirable revision, and the substance has been incorporated in the staff's revision.

SECTION 1297.

Subdivision (1) [Subdivision (4) on the pink.] The Bar recommended a standard 10 day notice on petitions in order to give a respondent time to file a response. This revision is necessary in view of the revisions that have been previously recommended.

Subdivision (10) on Green. The Bar recommended that arbitration petitions should take precedence on court calendars. The Staff recommends against the proposal because it does not believe that arbitration proceedings are that much more important than other proceedings.

SECTION 1297.5.

The Bar recommended that the court be required to make findings if it vacates, modifies or corrects an award. In view of the Commission's previous decision on findings, the staff did not believe that any exceptions should be made to the general rule stated in this section.

SECTION 1298.

Subdivision (1). The Bar recommended that the words "in arbitration" be added after "rehearing" to eliminate a possible ambiguity. As this

clarifies the section and does not alter the meaning, the staff has incorporated this revision.

The entire section has been recast by the staff to accord with the revisions made in other places in the statute.

#### ADDITIONAL PROVISIONS

The A.A.A. proposed that some sort of joinder provision be drafted so that other parties might be brought into arbitration proceedings. The staff does not believe that a person, not a party to an arbitration agreement, should be brought into arbitration proceedings. Even if such a person were a party to a different arbitration agreement, the complexities involved in compelling him to arbitrate appear to be insurmountable. The staff does not approve of this recommendation.

The A.A.A. also believes that some sort of provisional remedies should be provided for arbitration proceedings. The staff believes that, if the parties wish to have judicial relief, they should go to court. The staff does not believe that it is desirable to provide arbitration proceedings with all of the procedural devices available in civil litigation. Moreover, the staff believes that it would be dangerous to provide the provisional remedy of injunction in collective bargaining situations. The staff recommends rejection of this proposal.

Respectfully submitted,

Joseph B. Harvey  
Assistant Executive Secretary

An act to repeal Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure, to add Title 9 (commencing with Section 1280) to Part 3 of the Code of Civil Procedure, to amend Section 1053 of the Code of Civil Procedure and to amend Sections 1730 and 3390 of the Civil Code, relating to arbitration.

The people of the State of California do enact as follows:

SECTION 1. Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure is repealed.

SEC. 2. Title 9 (commencing with Section 1280) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 9. ARBITRATION

CHAPTER 1. GENERAL PROVISIONS

1280. As used in this title:

(1) "Agreement" includes agreements providing for valuations, but is not limited to, appraisals and similar proceedings and agreements between employers and employees or between their respective representatives.

(2) "Award" includes an award made pursuant to an agreement not in writing.

(3) "Controversy" includes any question arising between the parties to an agreement whether such question is one of law or of fact or both.

(4) "Neutral arbitrator" means an arbitrator who is (a) selected jointly by the parties to an agreement to arbitrate or by their representatives or (b) appointed by the court when the parties or their representatives jointly fail to do so.

~~[(5) -- "Written agreement" shall be deemed to include a written agreement which has been extended or renewed by an oral or implied agreement.]~~

1281. A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.

#### CHAPTER 2. ENFORCEMENT OF ARBITRATION AGREEMENTS

1282. (1) Subject to subdivision (2) of this section, on petition of a party alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order arbitration of such controversy if it determines that ~~[such]~~ an agreement to arbitrate such controversy exists, unless it determines that:

- (a) The right to arbitrate has been waived by the petitioner; or
- (b) Grounds exist for the revocation of the agreement.

(2) The court shall not order arbitration if it determines that:

- (a) The petitioner has not complied with the conditions precedent to arbitration set forth in the agreement; and
- (b) The other party has not prevented the petitioner from fulfilling such conditions; and
- (c) The other party has not waived such conditions.

~~[(2)]~~ (3) If the court determines that an agreement to arbitrate

a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the matter in issue lacks substantive merit.

[~~(3)~~] (4) If the court determines that there are other issues, not subject to arbitration, that are the subject of a pending action or special proceeding between the parties and that a determination of such issues may make the arbitration unnecessary, the court may order arbitration but stay its order until such determination or until such earlier time as the court specifies.

(5) On petition, the court may enjoin an arbitration proceeding commenced or threatened if it determines that there is no agreement to arbitrate the controversy.

1283. (1) If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of [~~an issue~~] a controversy involved in an action or proceeding pending before a court of this State, the court of this State in which such action or proceeding is pending shall, upon motion of a party, stay such action or proceeding until an arbitration is had in accordance with the order for arbitration or until such earlier time as the court specifies.

(2) If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order compelling arbitration of [~~an issue~~] a controversy involved in an action or proceeding pending before a court of this State and such application is undetermined, the court of this State in which such action or proceeding is pending shall, upon motion of a party, stay such action or proceeding until the application for an order compelling arbitration is determined and, if arbitration of



such [issue] controversy is ordered, until an arbitration is had in accordance with the order for arbitration or until such earlier time as the court specifies.

(3) If the [issue] controversy subject to arbitration is severable, the stay may be with respect to that [issue] controversy only.

1284. (1) If the arbitration agreement provides or the parties otherwise agree upon a method of appointing an arbitrator, such method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his successor has not been appointed, the court, on petition of a party, shall appoint one or more arbitrators in accordance with the agreed method to fullest extent possible.

(2) When a petition is made to the court to appoint a neutral arbitrator and the method provided under subdivision (1) of this section cannot be followed, the court shall nominate five persons from lists of persons supplied jointly by the parties or obtained from a governmental agency or [a] private disinterested association concerned with arbitration. The parties may within five days of receipt of such nominees from the court jointly select the arbitrator [~~by-agreement-ex-let-from-the-nominees~~]. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

### CHAPTER 3. CONDUCT OF ARBITRATION PROCEEDINGS

1285. Unless the parties otherwise agree:

(1) The arbitration shall be by a single neutral arbitrator.

(2) Subject to subdivision (5) of Section 1286, if there is more than one arbitrator, the powers and duties of the arbitrators, other than the powers and duties of a neutral arbitrator, may be exercised by a majority of them if reasonable notice of all proceedings has been given to all arbitrators.

(3) If there is more than one neutral arbitrator, the powers and duties of a neutral arbitrator under Section 1288, subdivisions (1) and (2) of Section 1286 and subdivision (2) of Section 1289 may be exercised by a majority of the neutral arbitrators or, by unanimous agreement of the neutral arbitrators, such powers and duties may be delegated to one of their number.

(4) If there is no neutral arbitrator, the powers and duties of a neutral arbitrator may be exercised by a majority of the arbitrators.

1286. Unless the parties otherwise agree:

(1) The neutral arbitrator shall appoint a time and place for the hearing and cause notice to the parties and to the other arbitrators to be served personally or by registered or certified mail not less than seven days before the hearing. Appearance at the hearing waives notice. The neutral arbitrator may adjourn the hearing from time to time as necessary. On request of a party for good cause, or upon his own determination, the neutral arbitrator may postpone the hearing to a time not later than the date fixed by the agreement for making the award or to a later date if the parties consent thereto.

(2) The neutral arbitrator shall preside at the hearing, shall rule on the admission and exclusion of evidence and on questions of hearing procedure and shall exercise all powers relating to the conduct of the hearing.

(3) The parties are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of any party, the testimony of witnesses shall be given under oath.

(4) If an order to arbitrate has been made pursuant to Section 1282, the arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear.

(5) If an arbitrator for any reason fails to act, the hearing shall continue but only the remaining neutral arbitrator or neutral arbitrators may [~~determine-the-questions-submitted~~] make the award.

(6) If a neutral arbitrator obtains information relating to the [~~issues~~] controversy other than at the hearing, he shall disclose such information to all parties to the arbitration and give the parties an opportunity to meet it.

1287. A party has the right to be represented by an attorney at any proceeding or hearing under this title and [~~no~~] a waiver of this right [is binding] may be revoked; but if a party revokes his waiver of his right to be represented by an attorney, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.

1288. (1) Upon application of a party or upon his own determination, the neutral arbitrator may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents and other evidence. Subpoenas shall be ~~issued,~~ served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code.

(2) The neutral arbitrator may administer oaths.

(3) On application of a party and for use as evidence and not for discovery, the neutral arbitrator may order the deposition of a witness who cannot be subpoenaed or is unable to attend the hearing to be taken in the manner prescribed by law for the taking of depositions in civil actions. If the neutral arbitrator orders the taking of the deposition of a witness who resides outside the State, the party who applied for the taking of the deposition shall obtain a commission therefor from the superior court in accordance with Sections 2024 to 2028, inclusive, of this code.

(4) Except for the parties and their agents, officers and employees, all witnesses appearing pursuant to subpoena ~~shall~~ <sup>are entitled to</sup> receive fees and mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in the superior court. The fee ~~[s]~~ and mileage ~~[expenses]~~ of a witness subpoenaed upon the application of a party shall be paid by the party at whose request the witness is subpoenaed. The fee[s] and mileage ~~[expenses]~~ of a witness subpoenaed solely upon the determination of the neutral arbitrator shall be paid for in the manner provided for the payment of the neutral arbitrator's expenses.

1289. (1) The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary to the award made.

(2) The neutral arbitrator shall serve a signed copy of the award on each party personally or by registered or certified mail or as provided in the agreement.

(3) The award shall be made <sup>and served</sup> within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on petition of a party. The parties may extend <sup>in writing</sup> the time either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he gives the arbitrators written notice of his objection prior to the service of a signed copy of the award on him.

1290. (1) The arbitrators, upon written application of a party, may modify or correct the award upon any of the grounds set forth in subdivisions (1)(a) and (1)(c) of Section 1294 not later than <sup>30</sup>~~25~~ days after service of a signed copy of the award on the applicant.

(2) Application for such modification or correction shall be made not later than 10 days after service of a signed copy of the award on the applicant. <sup>Upon or</sup> before making such application, the applicant shall deliver or mail a copy of the application to all of the other parties to the arbitration.

(3) Any party to the arbitration may make written objection to such application. The objection shall be made not later than 10 days after the application is delivered or mailed to the objector. Upon or

before making such objection, the objector shall deliver or mail a copy of the objection to the applicant and all the other parties to the arbitration.

(4) The arbitrators shall either deny the application or modify or correct the award. The denial of the application or the modification or correction of the award shall be in writing and signed by the arbitrators concurring therein, and the neutral arbitrator shall serve a signed copy of such denial or modification or correction on each party personally or by registered or certified mail or as provided in the agreement. If no modification or correction of the award is served within the 30-day period provided in subdivision (1) of this section, the application for modification or correction shall be deemed denied on the last day of the 30-day period.

1291. Unless otherwise [~~provided in the agreement to arbitrate~~] agreed to by the parties, each party shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses incurred in the conduct of the arbitration, not including counsel fees or witness fees or other expenses incurred by the parties.

#### CHAPTER 4. ENFORCEMENT OF AWARDS

1291.5. A proceeding under this chapter to confirm, to modify or correct or to vacate an award is commenced by serving and filing a petition requesting such relief. Only a party to the arbitration may serve and file a petition under this chapter. The respondent named in the petition shall serve and file a response to the petition if he requests any relief other than that prayed for in the petition.

1292. [(1)--Upon petition of a party filed within one year after service--  
of a signed copy of the award upon him, the court shall confirm an award  
unless a timely petition to vacate, modify or correct the award has been  
filed as provided in Sections 1293 and 1294 and is pending.]

[(2)--Unless a copy thereof has previously been filed in the proceed-  
ing, the party petitioning for an order confirming, vacating, modifying or  
correcting an award shall allege the substance of or attach to the petition  
a copy of each of the following:]

[(a)--The agreement to arbitrate.]

[(b)--The names of the arbitrators.]

[(c)--The award.]

Subject to Section 1294.5, when a petition is served and filed under  
this chapter, the court shall confirm the award if it finds that the parties  
to the proceeding under this chapter were included within and bound by the  
agreement to arbitrate the controversy unless the court vacates or modifies  
or corrects the award as prescribed in Sections 1293 and 1294.

1293. (1) [Upon petition of an aggrieved party to the arbitration]  
Subject to Section 1294.5, when a petition or response requests that an  
award be vacated, the court shall vacate [an] the award if the court finds  
that:

- (a) The award was procured by corruption, fraud or other undue means;
- (b) There was corruption in any of the arbitrators;
- (c) The rights of the [petitioner] party requesting that the award  
be vacated were substantially prejudiced by misconduct of a neutral  
arbitrator;

(d) The arbitrators exceeded their powers; or

(e) The rights of the ~~[petitioner]~~ party requesting that the award be vacated were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

~~[(2)--A petition under this section shall be filed within 90 days after service of a signed copy of the award on the petitioner.]~~

~~[(3)]~~ (2) If the award is vacated on any of the grounds stated in subdivision (1) of this section, the court may order a rehearing before new arbitrators chosen as provided in Section 1284. If the award is vacated on the grounds set forth in paragraph (d) or (e) of subdivision (1) ~~[(d) or (e)]~~ of this section, the court ~~[may,]~~ with the consent of the parties ~~[,]~~ may order a rehearing before the original arbitrators ~~[or their successors appointed in accordance with Section 1284]~~. The period of time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order for rehearing.

~~[(4)--If the court denies the petition to vacate the award, the court shall, on request of a party, confirm the award.]~~

1294. (1) ~~[Upon petition of any party to the arbitration made within 90 days after the service of a signed copy of the award on the petitioner]~~

Subject to Section 1294.5, when a petition or response requests that an award be modified or corrected, the court shall modify or correct the award if the court finds that:



(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the [issues] controversy submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(2) If the [~~petition is granted, the~~] court [~~shall modify or correct~~] modifies or corrects the award [~~so as to effect its intent and, if requested by a party,~~], the court shall confirm the award as so modified or corrected.

~~[(3) -- If the court denies a petition to modify or correct an award, the court shall, on request of a party, confirm the award.]~~

1294.5. (1) Except as otherwise provided in this section, a petition requesting that an award be confirmed under Section 1292 shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner.

(2) Except as otherwise provided in this section, a petition requesting that an award be vacated under Section 1293 shall be served and filed not later than 90 days after the date of service of a signed copy of the award upon the petitioner.

(3) Except as otherwise provided in this section, a petition or response requesting that an award be modified or corrected under Section 1294 shall be served and filed not later than 90 days after the date of service of a signed copy of the award upon the person requesting such relief.

(4) Subject to the limitation set forth in subdivision (3) of this

section, a response shall be served and filed within 10 days from the date of service of the petition unless such time is extended by the court.

(5) No petition may be filed under this chapter until at least 10 days after service of the signed copy of the award on the petitioner. If an application to the arbitrators for modification or correction of the award is made under Section 1290 during such 10-day period, a petition may not be filed under this chapter until the final determination of the application for modification or correction under Section 1290. If an application is made to the arbitrators for modification or correction of the award under Section 1290, the date of the service of the award for the purpose of subdivisions (1), (2) and (3) of this section shall be deemed to be the date of the service upon the petitioner of a signed copy of the modification or correction of the award or of the denial of the application or the date that such application is deemed to be denied under subdivision (4) of Section 1290.

(6) The time limits provided in subdivisions (1), (2), (3) and (4) of this section may be extended by an agreement in writing between the parties.

1295. [(1)] Upon the granting of an order confirming an award, judgment shall be entered in conformity therewith. The judgment when rendered by the court shall be docketed as if it were rendered in an action. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action; and [~~except as provided in subdivision (2) of this section,~~] it may be enforced as if it had been rendered in an action in the court in

which it is entered.

~~[(2)--If a controversy is determined by an award that, if it were a contract between the parties, would be required to be approved by a court, the award shall be deemed to be such a contract and shall be subject to such approval.]~~

1295.5. Unless an award is vacated as provided in this [title] chapter, the award may be enforced in the same manner and to the same extent as a contract between the parties, whether the award is confirmed or not; but any ground for vacating an award under Section 1293 is a defense in an action to enforce the award under this section.

#### CHAPTER 5 GENERAL PROVISIONS RELATING TO JUDICIAL PROCEEDINGS

1296. (1) Subject to subdivision (2) and (4) of this section, [A] any petition [for an order to arbitrate made pursuant to Section 1282 or a petition for the appointment of an arbitrator made pursuant to Section 1284] made prior to the commencement of arbitration proceedings shall be filed in the superior court in:

(a) The county where the agreement is to be performed or was entered into.

(b) If the agreement does not specify a county where the agreement is to be performed and the agreement was not entered into in any county in this State, the county where any party resides or has a place of business. [or where the agreement is to be performed, or, if no party has a residence or place of business in this State and the place of performance is not specified in the agreement,]

(c) In any case not covered by paragraph (a) or (b) of this subdivision, in any county in this State.

(2) If a controversy referable to arbitration under an alleged agreement is involved in an action or proceeding pending in a superior court, a petition for an order to arbitrate shall be filed in such action or proceeding. [A motion for a stay of an action made pursuant to Section 1283 shall be filed in the court where the action is pending.]

(3) Subject to subdivisions (2), (4) and (5) of this section, any petition made after the commencement or completion of arbitration proceedings shall be filed in the superior court in the county where the arbitration is being or has been held, or, if not held exclusively in any one county of this State, then such petition shall be filed as provided in subdivision (1) of this section.

(4) After a petition has been filed under Section 1282 or 1284 or under subdivision (3) of Section 1289, any subsequent petition under those sections involving the same agreement to arbitrate and the same controversy and parties shall be filed in the same court and heard in and as a part of the earlier proceeding.

(5) After a petition has been filed under Chapter 4 (commencing with Section 1291.5) of this title, any subsequent petition under such chapter involving the same award and the same parties shall be filed in the same court and heard as a part of the earlier proceedings.

(6) A motion for a stay of an action made pursuant to Section 1283 shall be made in the court where the action is pending.

1297. (1) A petition under this title shall set forth in the caption the names of the petitioner and as respondents the other parties to the

arbitration agreement or award, if any.

(2) Unless a copy thereof has previously been filed in the proceeding, a person seeking relief under Section 1292 or 1294 shall:

(a) Allege the substance of or attach to his petition or response a copy of the agreement to arbitrate.

(b) Set forth in this petition the names of the arbitrators.

(c) Incorporate in or attach to his petition a copy of the award and the written opinion of the arbitrators, if any.

(3) Unless a copy thereof has previously been filed in the proceeding, the petitioner seeking relief under Section 1293 shall:

(a) Allege the substance of or attach to his petition a copy of the agreement to arbitrate unless the existence or validity of such an alleged agreement is denied.

(b) Set forth in his petition the names of the arbitrators.

(c) Incorporate in or attach to his petition a copy of the award and the written opinion of the arbitrators, if any.

~~[(1)]~~ (4) Except as otherwise provided in this ~~[title]~~ section, a petition under this title shall be heard in the manner and upon the notice provided by law for the making and hearing of motions except that not less than 10 days initial notice of the date set for the hearing on a petition shall be given.

~~[(2)]~~ (5) A copy of the petition and a written notice of the time and place of the hearing thereof and any other papers required by Section 1010 shall be served in the manner provided in the arbitration agreement for the service of such petition and notice.

~~[(3)]~~ (6) If the arbitration agreement does not provide the manner

in which a copy of ~~the~~ such petition and notice shall be served, the copy of the petition and ~~the~~ notice ~~thereof~~ and any other papers required by Section 1010 shall be served in the manner provided by law for the service of summons in an action or in the manner provided in subdivision ~~[(4)]~~ (7) of this section unless:

(a) The person on whom service is to be made has previously appeared in the proceeding, or

(b) The person on whom service is to be made has previously been served with any petition in the proceeding in the manner provided by law for the service of summons in an action or in the manner provided in subdivision ~~[(4)]~~ (7) of this section.

~~[(4)]~~ (7) Subject to subdivision ~~[(2)]~~ (5) of this section, service of the copy of the petition and the notice and any other papers required by Section 1010 may be made upon a person outside this State by mailing the copy of the petition and the notice and other papers to such person by registered or certified mail. Personal service outside the State is the equivalent of such service by mail. Proof of service by mail shall be made by affidavit showing such mailing together with the return receipt of the United States Post Office bearing the signature of the person on whom service is to be made. Notwithstanding any other provision of this title, if service is made in the manner provided in this subdivision, the petition may not be heard until at least 30 days after the date of such service.

~~[(5)]~~ (8) Subject to subdivision ~~[(2)]~~ (5) of this section, if the person on whom service is to be made has previously appeared in the proceeding or has previously been served in the manner specified in

subdivision [~~(3)~~] (6) or [~~(4)~~] (7) of this section, the copy of the petition and notice and any other papers required by Section 1010 shall be served as provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code.

(9) A response shall be served as provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code.

1297.5. Findings of fact and conclusions of law need not be made by the court upon the determination of a petition or motion under this title.

1298. (1) An appeal may be taken from:

(a) An order denying a petition to compel arbitration under subdivision (1) of Section 1282.

(b) [~~An order granting or denying a petition to modify, correct or confirm an award.~~] An order enjoining arbitration under subdivision (5) of Section 1282.

(c) An order [~~granting or~~] denying a petition [~~to vacate an award~~] under Chapter 4 (commencing with Section 1291.5) of this title unless a rehearing in arbitration is ordered.

(d) An order confirming an award.

(e) An order modifying or correcting an award.

(f) An order vacating an award unless a rehearing in arbitration is ordered.

[~~(a)~~] (g) A judgment entered pursuant to this title.

(2) The appeal shall be taken in the same manner as an appeal from an order or judgment in a civil action.

1298.5. The court shall award costs upon any judicial proceeding under this title as provided in Chapter 6 (commencing with Section 1021) of Title 14 of Part 2 of this code.

1299. The making of an agreement in this State providing for arbitration to be had within this State shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such agreement by the making of any orders provided for in this title and by entering of judgment on an award under the agreement. An agreement made in this State which does not specify a place for the arbitration to be held



shall be considered to provide for arbitration within this State.

SEC. 3. Section 1053 of the Code of Civil Procedure is amended to read:

1053. When there are three referees [~~, or three arbitrators,~~] all must meet, but two of them may do any act which might be done by all.

SEC. 4. Section 1730 of the Civil Code is amended to read:

1730. SALE AT A VALUATION. Except as otherwise provided in Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure:

(1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Chapters 4 and 5 of this act.

SEC. 5. Section 3390 of the Civil Code is amended to read:

3390. The following obligations cannot be specifically enforced:

1. An obligation to render personal service;
2. An obligation to employ another in personal service;
3. [~~An agreement to submit a controversy to arbitration;~~]

[4.] An agreement to perform an act which the party has not power lawfully to perform when required to do so;

[5.] 4. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or

[6.] 5. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

SEC. 6. (1) Except as otherwise provided in subdivision (2) of this section, this act applies to all contracts whether executed before or after the effective date of this act.

(2) Section 1299 of the Code of Civil Procedure, as added by this act, does not apply to any contract executed before the effective date of this act; but such section does apply to any renewal or extension of an existing contract on or after the effective date of this act and to any new contract executed on or after the effective date of this act.

(32)

EXHIBIT B

SUGGESTED REVISIONS BY STATE BAR COMMITTEE ON  
ARBITRATION OF TENTATIVE RECOMMENDATIONS OF  
CALIFORNIA LAW REVISION COMMISSION

September 8, 1960

Revised October 15, 1960

(Proposed additional language is written in all capital letters and  
language proposed to be deleted is stricken through.)

An act to repeal Title 9 (commencing with Section 1280) of Part 3 of the  
Code of Civil Procedure, to add Title 9 (commencing with Section 1280)  
to Part 3 of the Code of Civil Procedure, to amend Section 1053 of the  
Code of Civil Procedure and to amend Sections 1730 and 3390 of the  
Civil Code, all relating to arbitration.

The people of the State of California do enact as follows:

SECTION 1. Title 9 (commencing with Section 1280) of Part 3 of the  
Code of Civil Procedure is hereby repealed.

SEC. 2. Title 9 (commencing with Section 1280) is added to Part 3  
of the Code of Civil Procedure, to read:

## TITLE 9. ARBITRATION

1280. As used in this title:

(1) "Agreement" IS NOT LIMITED TO BUT includes agreements providing for valuations, appraisals and similar proceedings and agreements between employers and employees or between their respective representatives.

(2) "Award" includes an award made pursuant to an agreement not in writing.

(3) "Controversy" includes any question arising between the parties to an agreement whether such question is one of law or of fact OR BOTH.

(4) "Neutral arbitrator" means an arbitrator who is (a) selected jointly by the parties to an agreement to arbitrate or by their representatives or (b) appointed by the court when the parties or their representatives jointly fail to do so.

~~(5) -- "Written agreement" shall be deemed to include a written agreement which has been extended or renewed by an oral or implied agreement.~~

1281. A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract. COMMON LAW ARBITRATION IS ABOLISHED. ARBITRATION MAY BE COMPELLED AND ENFORCED ONLY AS PROVIDED IN THIS TITLE.

1282. (1) On petition of a party alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate SUCH CONTROVERSY, the court shall order arbitration OF SUCH

CONTROVERSY if it determines that AN agreement TO ARBITRATE SUCH CONTROVERSY exists, unless it determines that:

(A) THE CONDITIONS PRECEDENT TO ARBITRATION SET FORTH IN THE AGREEMENT HAVE NOT BEEN FULFILLED BY THE PETITIONER, UNLESS SUCH FULFILLMENT HAS BEEN PREVENTED, OR SUCH CONDITIONS HAVE BEEN WAIVED, BY THE OTHER PARTY; OR

(aB) The right to arbitrate has been waived by the petitioner; or

(aC) Grounds exist for the revocation of the agreement.

(2) IF THE COURT DETERMINES THAT ANY AGREEMENT TO ARBITRATE A CONTROVERSY EXISTS an order to arbitrate SUCH CONTROVERSY may not be refused on the ground that the matter in issue lacks substantive merit.

(3) If the court determines that there are other issues, not subject to arbitration, that are the subject of a pending action or special proceeding between the parties and that a determination of such issues may make the arbitration unnecessary, the court may order arbitration but stay its order until such determination or until such earlier time as the court specifies.

(4) THE COURT MAY ENJOIN AN ARBITRATION PROCEEDING COMMENCED OR THREATENED IF IT DETERMINES THAT THERE IS NO AGREEMENT TO ARBITRATE THE CONTROVERSY.

1283. (1) If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of an-issue CONTROVERSY involved in an action or proceeding pending before a court of this State, the court OF THIS STATE in which such action or proceeding is pending shall, upon motion of a party, stay such action or proceeding until an arbitration is had in accordance with the order for arbitration or until such earlier time as the court specifies.

(2) If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order compelling arbitration of an-issue CONTROVERSY involved in an action or proceeding pending before a court of this State and such application is undetermined, the court OF THIS STATE in which such action or proceeding is pending shall, upon motion of a party, stay such action or proceeding until the application for an order compelling arbitration is determined and, if arbitration of such issue CONTROVERSY is ordered, until an arbitration is had in accordance with the order for arbitration or until such earlier time as the court specifies.

(3) If the issue CONTROVERSY subject to arbitration is severable, the stay may be with respect to that issue CONTROVERSY only.

1284. (1) If the arbitration agreement provides or the parties otherwise agree upon a method of appointing an arbitrator, such method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and his successor has not been appointed, the court, on petition of a party, shall appoint one or more arbitrators IN ACCORDANCE WITH THE AGREED METHOD TO THE FULLEST EXTENT POSSIBLE.

(2) When a petition is made to the court to appoint a neutral arbitrator AND THE METHOD UNDER SUBDIVISION (1) ABOVE CANNOT BE FOLLOWED, THEN the court shall nominate five persons from lists of persons supplied jointly by the parties or obtained from a governmental agency or a private disinterested association concerned with arbitration. The parties may within five days of receipt of such nominees from the court jointly select

the arbitrator ~~by agreement or let from the nominees.~~ If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

1285. Unless the parties otherwise agree:

(1) The arbitration shall be by a single neutral arbitrator.

(2) EXCEPT UNDER THE CIRCUMSTANCES COVERED BY ~~Subject to~~ subdivision (5) of Section 1286, if there is more than one arbitrator, ~~the powers and duties of the arbitrators, other than the powers and duties of a neutral arbitrator,~~ THE AWARD ~~may~~ SHALL be RENDERED exercised by a majority of them if reasonable notice of all proceedings has been given to all arbitrators.

(3) If there is more than one neutral arbitrator, the powers and duties of a neutral arbitrator under Section 1288, subdivisions (1) and (2) of Section 1286 and subdivision (2) of Section 1289 may be exercised by a majority of the neutral arbitrators or, by unanimous agreement of the neutral arbitrators, such powers and duties may be delegated to one of their number.

(4) If there is no neutral arbitrator, the powers and duties of a neutral arbitrator may be exercised by a majority of the arbitrators.

1286. Unless the parties otherwise agree:

(1) The neutral arbitrator shall appoint a time and place for the hearing and cause notice to the parties and to other arbitrators to be served personally or by registered or certified mail not less than seven days before the hearing. Appearance at the hearing waives notice. The neutral arbitrator may adjourn the hearing from time to time as necessary.



On request of a party for good cause, or upon his own determination, the neutral arbitrator may postpone the hearing to a time not later than the date fixed by the agreement for making the award or to a later date if the parties consent thereto.

(2) The neutral arbitrator shall preside at the hearing, shall rule on the admission and exclusion of evidence and on questions of hearing procedure and shall exercise all powers relating to the conduct of the hearing. IF ANY PARTY SO REQUESTS, WITNESSES SHALL BE SWORN.

(3) The parties are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed.

(4) If an order to arbitrate has been made pursuant to Section 1282, the arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear.

(5) If an arbitrator WITH PROPER NOTICE OF ALL PROCEEDINGS for any reason fails to act, the hearing shall continue but only the remaining neutral arbitrator or neutral arbitrators may ~~determine-the-questions submitted.~~ RENDER THE AWARD.

(6) THE ~~If-a~~ neutral arbitrator SHALL CONSIDER AND ACT SOLELY ON THE RECORD MADE BEFORE HIM; PROVIDED, HOWEVER, THAT HE MAY TAKE NOTICE OF THOSE FACTS OF WHICH COURTS MAY TAKE JUDICIAL NOTICE UNDER SECTION 1875 OF THIS CODE ~~obtains-information-relating-to-the-issues-other-than at-the-hearing,-he-shall-disclose-such-information-to-all-parties-to-the arbitration-and-give-the-parties-an-opportunity-to-meet-it.~~

1287. A party has the right to be represented by an attorney at any proceeding or hearing under this title and no ANY waiver of this right is REVOCABLE binding; PROVIDED, HOWEVER, THAT IF ANY PARTY RETRACTS HIS WAIVER OF HIS RIGHT TO BE REPRESENTED BY AN ATTORNEY THE OTHER PARTY SHALL BE ENTITLED TO A REASONABLE CONTINUANCE FOR THE PURPOSE OF PROCURING AN ATTORNEY.

1288. (1) Upon application of a party or upon his own determination the neutral arbitrator may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents and other evidence. Subpoenas shall be issued, served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code.

(2) The neutral arbitrator may administer oaths.

(3) On application of a party and for use as evidence and not for discovery, the neutral arbitrator may order the deposition of a witness who cannot be subpoenaed or is unable to attend the hearing to be taken in the manner prescribed by law for the taking of depositions in civil actions. If the neutral arbitrator orders the taking of the deposition of a witness who resides outside the State, the party who applied for the taking of the deposition shall obtain a commission therefor from the superior court in accordance with Sections 2024 to 2028, inclusive, of this code.

(4) Except for the parties and their agents, officers and employees, all witnesses appearing pursuant to subpoena shall BE ENTITLED TO receive fees and mileage in the same amount and under the same circumstances as

prescribed by law for witnesses in civil actions in THE superior court. The fees- and mileage expenses OF A WITNESS SUBPENAED UPON THE APPLICATION OF A PARTY shall be paid by the party at whose request the witness is subpenaed. The fees- and mileage expenses of a witness subpenaed SOLELY upon the determination of the neutral arbitrator shall be paid for in the manner provided for the payment of the neutral arbitrator's expenses.

1289. (1) The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary to the award made.

(2) The neutral arbitrator shall serve a signed copy of the award on each party personally or by registered or certified mail or as provided in the agreement.

(3) The award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on petition of a party. The parties may extend IN WRITING the time either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he gives the arbitrators written notice of his objection prior to the service of a signed copy of the award on him.

1290. (1) The arbitrators, upon written application of a party may modify or correct the award upon any of the grounds set forth in subdivisions (1)(a) and (1)(c) of Section 1294 not later than 30 25 days after service of a signed copy of the award on the applicant.

(2) Application for such modification or correction shall be made not later than 10 days after service of a signed copy of the award on the applicant. UPON OR before making such application, the applicant shall deliver or mail a copy of the application to all of the other parties to the arbitration.

(3) Any party to the arbitration may make written objection to such application. The objection shall be made not later than 10 days after the application is delivered or mailed to the objector. UPON OR before making such objection the objector shall deliver or mail a copy of the objection to the applicant and all the other parties to the arbitration.

(4) UNLESS THE ARBITRATORS DENY IN WRITING SAID APPLICATION, THEY SHALL ISSUE A CORRECTED AWARD OR AMENDMENT TO THE AWARD IN ACCORDANCE WITH SUBDIVISIONS (1) AND (2) OF SECTION 1289. IN THE EVENT THAT NO CORRECTED AWARD OR AMENDMENT TO THE AWARD IS ISSUED WITHIN THE 30-DAY PERIOD, THE APPLICATION SHALL BE DEEMED DENIED AS OF THE END OF THE 30-DAY PERIOD. FOR THE PURPOSE OF SUBDIVISIONS (1) AND (2) OF SECTION 1294.5, THE DATE OF THE SERVICE OF THE AWARD SHALL BE DEEMED TO BE THE DATE OF THE DENIAL OF THE APPLICATION OR THE DATE OF THE SERVICE OF THE CORRECTED AWARD OR AMENDMENT TO THE AWARD.

1291. Unless otherwise ~~provided-in~~ AGREED TO BY the PARTIES, ~~agreement~~ ~~to-arbitrate~~, each party shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses incurred in the conduct of the arbitration, not including counsel fees or witness fees or other expenses incurred by the parties.

1292. ~~(1)--Upon petition of a party filed within one year after service of a signed copy of the award upon him, the court shall confirm an award unless a timely petition to vacate, modify or correct the award has been filed as provided in Sections 1293 and 1294 and is pending.~~

ANY PARTY TO AN ARBITRATION PROCEEDING MAY FILE A PETITION TO CONFIRM THE AWARD. IF THE COURT SHALL FIND THAT:

(A) THE RESPONDENT NAMED IN THE PETITION WAS INCLUDED WITHIN AND BOUND BY THE AGREEMENT TO ARBITRATE THE CONTROVERSY SET FORTH IN THE PETITION, AND

(B) THE AWARD WAS RENDERED DETERMINING SAID CONTROVERSY THE COURT SHALL CONFIRM THE AWARD UNLESS THE COURT, UPON TIMELY APPLICATION OF THE RESPONDENT, SHALL VACATE SAID AWARD ON ONE OR MORE OF THE GROUNDS SET FORTH IN SECTION 1293.

~~(2)--Unless a copy thereof has previously been filed in the proceeding, the party petitioning for an order confirming, vacating, modifying or correcting an award shall allege the substance of or attach to the petition a copy of each of the following:~~

~~(a)--The agreement to arbitrate.~~

~~(b)--The names of the arbitrators. [See § 1297(2)]~~

~~(c)--The award.~~

1293. (1) Upon petition of an aggrieved party to the arbitration, OR UPON TIMELY APPLICATION OF A RESPONDENT TO A PETITION TO CONFIRM, the court shall vacate an award if THE COURT FINDS THAT:

(a) The award was procured by corruption, fraud or other undue means;

(b) There was corruption in any of the arbitrators;

(c) The rights of the petitioner were substantially prejudiced by misconduct of a neutral arbitrator.

(d) The arbitrators exceeded their powers; or

(e) The rights of the petitioner were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

~~(2)--A-petition-under-this-section-shall-be-filed-within-90-days after-service-of-a-signed-copy-of-the-award-on-the-petitioner. [See §1294.5]~~

(23) If the award is vacated on any of the grounds stated in subdivision (1) of this section, the court may order a rehearing before new arbitrators chosen as provided in Section 1284. If the award is vacated on the grounds set forth in subdivision (1)(d) or (1)(e) of this section, the court may, with the consent of the parties, <sup>MAY</sup> order a rehearing before the original arbitrators ~~or their successors appointed in accordance with Section 1284~~. The period of time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order for rehearing.

(4) (3) If the court denies the petition to vacate the award, the court shall, ~~on request of a party,~~ confirm the award. [See § 1295.5(1)]

1294. (1) Upon petition of any party to the arbitration, ~~made within 90 days after the service of a signed copy of the award on the petitioner,~~ the court shall modify or correct the award if THE COURT FINDS THAT:

(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the CONTROVERSY issues submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(2) If the petition is granted, the court ~~shall modify or correct the award so as to effect its intent and, if requested by a party,~~ shall confirm the award as so modified or corrected.

(3) If the court denies a petition to modify or correct an award, the court shall, ~~on request of a party,~~ confirm the award UNLESS THE AWARD IS VACATED UNDER SECTION 1293.

1294.5. (1) A PETITION TO CONFIRM UNDER SECTION 1292 MUST BE FILED AND SERVED NOT LATER THAN FOUR YEARS AFTER SERVICE OF A SIGNED COPY OF THE AWARD ON THE PETITIONER.

(2) A PETITION TO MODIFY OR CORRECT OR TO VACATE AN AWARD UNDER SECTIONS 1293 OR 1294 MUST BE FILED AND SERVED NOT LATER THAN 90 DAYS AFTER SERVICE OF A SIGNED COPY OF THE AWARD ON THE PETITIONER.

(3) THE TIME LIMITS PROVIDED IN SUBDIVISIONS (1) AND (2) MAY BE EXTENDED BY AN AGREEMENT IN WRITING BETWEEN THE PARTIES.

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(4) ANY PERSON SERVED WITH A COPY OF ANY PETITION/UNDER SECTIONS 1292, 1293 OR 1294 WHO DESIRES TO OPPOSE SAID PETITION OR TO OBTAIN RELIEF OTHER THAN PRAYED FOR IN SAID PETITION, MAY, NOTWITHSTANDING THE PROVISIONS OF SUBSECTIONS 1, 2 AND 3 HEREOF, FILE A RESPONSE WITHIN TEN DAYS OF SERVICE OF SUCH PETITION UNLESS SUCH TIME IS EXTENDED BY THE COURT.

(5) NO PETITION MAY BE FILED UNDER SECTIONS 1292, 1293 OR 1294 UNTIL AT LEAST 10 DAYS AFTER SERVICE OF THE AWARD, AND IF, DURING SUCH 10-DAY

PERIOD, AN APPLICATION FOR MODIFICATION OR CORRECTION OF THE AWARD IS MADE UNDER SECTION 1290, THEN A PETITION MAY NOT BE FILED UNDER SECTIONS 1292, 1293 OR 1294 UNTIL THE FINAL DETERMINATION OF SUCH APPLICATION FOR MODIFICATION OR CORRECTION UNDER SECTION 1290.

1295. (1) Upon the granting of an order confirming an award, judgment shall be entered in conformity therewith. The judgment when rendered by the court shall be docketed as if it were rendered in an action. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action; and, ~~except as provided in subdivision (2) of this section,~~ it may be enforced as if it had been rendered in an action in the court in which it is entered.

~~(2) -- If a controversy is determined by an award that, if it were a contract between the parties, would be required to be approved by a court, the award shall be deemed to be such a contract and shall be subject to such approval.~~

1295.5. ARBITRATION AWARDS MAY BE CONFIRMED, MODIFIED OR CORRECTED BY THE COURT, OR VACATED ONLY AS PROVIDED IN THIS TITLE. ~~Unless an award is vacated as provided in this title, the award may be enforced in the same manner and to the same extent as a contract between the parties, whether the award is confirmed or not.~~

1296. (1) A petition for an order to arbitrate made pursuant to Section 1282 or a petition for the appointment of an arbitrator made pursuant to Section 1284 shall be filed in the county ~~where any party resides or has a place of business or~~ where the agreement was to be performed or WAS ENTERED INTO, OR IF ~~if no party has a residence or place of business in this State and~~ the place of performance is not specified in the agreement OR IT WAS NOT ENTERED INTO IN THIS STATE, IN THE COUNTY



WHERE ANY PARTY RESIDES OR HAS A PLACE OF BUSINESS ~~in any county in this~~  
State.

(2) A motion for a stay of an action made pursuant to Section 1283 shall be made in the court where the action is pending.

(3) Any petition made after the commencement OR COMPLETION of arbitration proceedings shall be filed in the county where the arbitration is being or has been held, or, if not held exclusively in any one county of this State, then such petition shall be filed as provided in subdivision (1) of this section.

(4) AFTER ANY PETITION HAS BEEN FILED UNDER SECTIONS 1282 or 1284, ANY SUBSEQUENT PETITION UNDER EITHER OF SAID SECTIONS INVOLVING THE SAME AGREEMENT TO ARBITRATE AND THE SAME CONTROVERSY AND PARTIES SHALL BE FILED IN THE SAME COURT AND HEARD IN AND AS A PART OF THE EARLIER PROCEEDING.

(5) AFTER ANY PETITION HAS BEEN FILED UNDER SECTIONS 1292, 1293, OR 1294, ANY SUBSEQUENT PETITIONS OR APPLICATIONS FOR RELIEF UNDER ANY OF SAID SECTIONS INVOLVING THE SAME AWARD SHALL BE FILED IN THE SAME COURT AND HEARD IN AND AS A PART OF THE EARLIER PROCEEDING.

1297. (1) A PETITION UNDER THIS TITLE SHALL SET FORTH IN THE CAPTION THE NAMES OF THE PETITIONER AND AS RESPONDENTS THE OTHER PARTIES TO THE ARBITRATION AGREEMENT OR AWARD, IF ANY.

(2) A PETITION UNDER SECTIONS 1292 OR 1294 SHALL, UNLESS A COPY THEREOF HAS PREVIOUSLY BEEN FILED IN THE PROCEEDING:

(A) ALLEGE THE SUBSTANCE OF OR ATTACH TO THE PETITION A COPY OF THE AGREEMENT TO ARBITRATE.

(B) SET FORTH THE NAMES OF THE ARBITRATORS.

(C) INCORPORATE OR ATTACH A COPY OF THE AWARD AND THE

WRITTEN OPINION OF THE ARBITRATORS, IF ANY.

(3) A PETITION UNDER SECTION 1293 SHALL, UNLESS A COPY THEREOF HAS PREVIOUSLY BEEN FILED IN THE PROCEEDING:

(A) ALLEGE THE SUBSTANCE OF OR ATTACH TO THE PETITION A COPY OF THE AGREEMENT TO ARBITRATE UNLESS THE EXISTENCE OR VALIDITY OF SUCH AN ALLEGED AGREEMENT IS DENIED.

(B) SET FORTH THE NAMES OF THE ARBITRATORS.

(C) INCORPORATE OR ATTACH A COPY OF THE AWARD AND THE WRITTEN OPINION OF THE ARBITRATORS, IF ANY.

(4) Except as otherwise provided in this SECTION ~~title~~, a petition under this title shall be heard in the manner and upon the notice provided by law for the making and hearing of motions, PROVIDED, HOWEVER, THAT NOT LESS THAN 10 DAYS INITIAL NOTICE OF THE DATE SET FOR THE HEARING SHALL BE GIVEN.

(5) A copy of the petition AND THE OTHER PAPERS REQUIRED BY SECTION 1010 OF THIS CODE and a written notice OF THE TIME AND PLACE OF HEARING thereof shall be served in the manner provided in the arbitration agreement FOR THE SERVICE OF SUCH PETITION AND NOTICE.

(6) If the arbitration agreement does not provide the manner in which a copy of SUCH ~~the~~ petition and notice shall be served, the copy of the petition and ~~the~~ notice ~~thereof~~ AND ANY OTHER PAPERS REQUIRED BY SECTION 1010 OF THIS CODE shall be served in the manner provided by law for the service of summons in an action or in the manner provided in subdivision (7) of this section unless:

(a) The person on whom service is to be made has previously appeared in the proceeding, or

(b) The person on whom service is to be made has previously been served with any petition in the proceeding in the manner provided by law for the service of summons in an action or in the manner provided in subdivision (74) of this section.

(74) Subject to subdivision (52) of this section, service of the copy of the petition and the notice may be made upon a person outside this State by mailing the copy of the petition and the notice to such person by registered or certified mail. Personal service outside the State is the equivalent of such service by mail. Proof of service by mail shall be made by affidavit showing such mailing together with the return receipt of the United States Post Office bearing the signature of the person on whom service is to be made. Notwithstanding any other provision of this title, if service is made in the manner provided in this subdivision, the petition may not be heard until at least 30 days after the date of such service.

(85) Subject to subdivision (52) of this section, if the person on whom service is to be made has previously appeared in the proceeding or has previously been served in the manner specified in subdivision (63) or (74) of this section, the copy of the petition and notice shall be served as provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code.

(9) AFTER THE FIRST FILING OF ANY PETITION UNDER SECTIONS 1292, 1293, OR 1294, THE RESPONDING PARTY MAY SEEK RELIEF UNDER ANY OF SUCH SECTIONS BY WAY OF RESPONSE TO SUCH PETITION AND NEED NOT FILE A CROSS PETITION AS SUCH. ALL PETITIONS AND RESPONSES UNDER SUCH SECTIONS SHALL BE HEARD AT THE SAME TIME.

(10) ON THE DAY NOTICED FOR ANY HEARING UNDER THIS TITLE, SUCH HEARING SHALL TAKE PRECEDENCE OF ALL OTHER MATTERS ON THE CALENDAR OF

SAID DAY, EXCEPT OLDER MATTERS OF THE SAME CHARACTER AND MATTERS TO WHICH SPECIAL PRECEDENCE MAY BE GIVEN BY LAW. [FROM CCP 527]

1297.5. Findings of fact and conclusions of law need not be made by the court upon the determination of a petition or motion under this title, EXCEPT WHERE THE COURT ORDERS AN AWARD VACATED OR MODIFIED OR CORRECTED.

1298. (1) An appeal may be taken from:

(a) An order denying a petition to compel arbitration under subdivision (1) of Section 1282.

(b) An order granting or denying a petition to ~~modify, correct or~~ confirm an award.

(c) An order granting or denying a petition to vacate an award unless a rehearing IN ARBITRATION is ordered.

(d) AN ORDER MODIFYING OR CORRECTING AND CONFIRMING AN AWARD, AN ORDER DENYING A PETITION TO MODIFY OR CORRECT AND VACATING AN AWARD, OR AN ORDER DENYING A PETITION TO MODIFY OR CORRECT AND CONFIRMING AN AWARD.

(e) A judgment entered pursuant to this title.

(2) The appeal shall be taken in the same manner as an appeal from an order or judgment in a civil action.

1298.5. The court shall award costs upon any judicial proceeding under this title as provided in Chapter 6 (commencing with Section 1021) of Title 14 of Part 2 of this code.

1299. The making of an agreement in this State providing for arbitration to be had within this State shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such

agreement by the making of any orders provided for in this title and by entering of judgment on an award under the agreement. An agreement made in this State which does not specify a place for the arbitration to be held shall be considered to provide for arbitration within this State.

SEC. 3. Section 1053 of the Code of Civil Procedure is amended to read:

1053. When there are three referees [~~er-three-arbitrators,~~] all must meet, but two of them may do any act which might be done by all.

SEC. 4. Section 1730 of the Civil Code is amended to read:

1730. SALE AT A VALUATION. Except as otherwise provided in Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure:

(1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Chapters 4 and 5 of this act.

SEC. 5. Section 3390 of the Civil Code is amended to read:

3390. The following obligations cannot be specifically enforced:

1. An obligation to render personal service;
2. An obligation to employ another in personal service;
3. [~~An agreement to submit a controversy to arbitration;~~]

[4.] An agreement to perform an act which the party has not power lawfully to perform when required to do so;

[5.] 4. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or

[6.] 5. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

SEC. 6. (1) Except as otherwise provided in subdivision (2) of this section, this act applies to all contracts whether executed before or after the effective date of this act.

(2) Section 1299 of the Code of Civil Procedure, as added by this act, does not apply to any contract executed before the effective date of this act; but such section does apply to any renewal or extension of an existing contract on or after the effective date of this act and to any new contract executed on or after the effective date of this act.

EXHIBIT C

Comments of the

American Arbitration Association

on the

Tentative Recommendations and Proposed Legislation

relating to

ARBITRATION

in California

The present arbitration statute of the State of California, Title 9 of Part 3 of the Code of Civil Procedure, of 1927, afforded one of the first modern laws in the United States whereby arbitration agreements could be enforced. More than thirty years experience with this statute has shown its versatility and adaptability to changing needs and times in both commercial and labor arbitration. Nevertheless, there are always minor defects or omissions which appear in any type of legislation. These often require slight revisions under changed circumstances, especially in the light of a great number of court decisions interpreting the application of sections 1280 following of the Code of Civil Procedure.

Thus, a revision of the California arbitration statute was considered necessary to clarify some ambiguous provisions. The general tenor of the changes in the California arbitration statute, as embodied in the proposed draft of a new Title 9 (p. 14 foll. of Doc. 32 of the California Law Revision Commission, of July 28, 1960) is exemplary. The proposed changes constitute a great improvement over the existing statutory California law on arbitration.

There were obviously painstaking efforts taken to provide for a truly modern arbitration law in California. Some comments are nevertheless called for with regard to certain proposed revisions as well as several omissions which might deserve further consideration.

1) Sect. 1280(2) permitting awards made pursuant to agreements not in writing appears to be too vague and also impractical, e.g. if there is no agreement in writing, how may an agency administering arbitration get



jurisdiction to commence an arbitration proceeding? Agreements not signed are valid but query whether oral agreements would not cause unnecessary confusion and frustration of the arbitral process.

2) On the other hand, if the suggestion for a statutory amendment that only arbitration agreements "in writing" be enforceable, then oral agreements which extend or renew previous written agreements should be enforceable. Often a written agreement calling for arbitration of disputes will expire while the parties are in the process of negotiating a new agreement to replace the one that expired. The parties continue to operate under the former agreement. It would be better if all doubt as to the validity of arbitration during this period could be removed.

3) Sect. 1280(5) is ample enough for any possible extensions.

4) Sections 1286(1), 1289(2) and 1297(4) provide for service by certified or registered mail. Service by ordinary mail has been proven sufficient in the practice of both commercial and labor arbitration, as provided e.g. in sect. 39 of the Commercial Arbitration Rules, and sect. 36 of the Voluntary Labor Arbitration Rules of the American Arbitration Association.

5) Sect. 1286(4) would preclude the use of ex parte arbitration without a court order. This would seriously hamper many interstate arbitration agreements.

6) Sect. 1288(3) specifically excludes discovery procedures. The reasons do not appear evident.

7) Sect. 1295(5), allowing for enforcement of an award which is not reduced to judgment should make some provision for the res judicata effect of such an unconfirmed award.

Among important omissions from the proposed text there may be mentioned:

a) Some type of joinder of parties should be permitted. Especially in the construction field, where there are contractors and sub-contractors involved, it is manifestly unfair to have the contractor go through a full arbitration proceeding and have to comply with certain requirements as to specific performance of work to be done, and then oblige him to sue the sub-contractor or go through another arbitration with the sub-contractor merely because the sub-contractor was not a party to the agreement with the owner.

b) Serious consideration might be given to whether a court proceeding should be stayed pending arbitration, where the party seeking the stay has taken no affirmative steps to compel arbitration. It is dangerous to allow the arbitration agreement to act as a dilatory plea in and of itself. Either the petitioner should be required to cross move to compel arbitration or the court should be specifically empowered to order the parties to proceed to arbitration on its own motion.

c) Provisional remedies might also be provided for an arbitration proceeding, just as they are authorized in court actions. Often the very subject of the dispute may become moot if the claimant cannot secure some injunctive relief or attachment-type remedy. At present the arbitrator may not grant such relief unless it is in the form of a final award, because his authority is limited to granting only one and, for that matter, final award. Once he grants preliminary relief it would be considered as final; he could thus be "functus officio", so that no further relief, on the basic issues, could be forthcoming in the same arbitration.

There may further be mentioned:

Sect. 3390 of the Civil Code, in its proposed amendment expressly provides for non-enforcement of contracts for personal service. It may be noted that a decision to the contrary of the N.Y. Court of Appeals was rendered in *Staklinski v. Pyramid Electric Co.*, 6 N.Y.2d 159, which has widely been discussed. Reference is made to recent notes in 7 *University of California Los Angeles Law Review* 507, and 45 *Cornell Law Quarterly* 580 (1960).

Indeed, the question presents an issue which should be left to the discretion of the arbitrator if the parties wish to give such authority. In this respect, the more recent decision of the N.Y. Court of Appeals, in *Grayson-Robinson Stores v. Iris Construction Corp.*, 8 N.Y.2d 133, may also be mentioned.