

2/26/69

## Memorandum 69-41

Subject: Study 36(5) - Condemnation Law and Procedure (Arbitration)

At its February meeting, the Commission suggested that the staff prepare a statute that would expressly authorize all public agencies to arbitrate "just compensation." Attached to this memorandum is a draft that should accomplish this purpose. Also attached, for purposes of comparison, are the Eminent Domain Arbitration Rules of the American Arbitration Society (Exhibit I).

As Professor Ayer pointed out in his study (Allocating the Costs of Determining "Just Compensation"), voluntary arbitration certainly is not "the answer" to improving California's condemnation procedure. Nonetheless, the staff believes that a clear authorization to arbitrate will be of value. Inasmuch as California has had no pertinent experience, and as property acquisition by public entities is a highly conventionalized activity, it seems impossible to predict that immediate or widespread resort will be had to arbitration. However, a statute indicating the Legislature's approbation of the practice might generate sufficient experimentation to create the experience and familiarity needed to make arbitration fairly commonplace. Certainly the statute can do no harm. Also, inasmuch as resort to arbitration is left as an entirely voluntary matter between the parties, and as the terms of the arbitration agreement are also left to them, the statute would not become outdated by innovations in condemnation law or procedure. Presumably, the parties would simply adapt their agreements and the terms upon which they are willing to arbitrate to those innovations.

There is a temptation in drafting this statute to undertake, in effect, to write the arbitration agreement for the parties. Unfortunately, the rules of the American Arbitration Association vary in significant details from the features of California condemnation practice. For example, interest on the award is fixed at 6% rather than 7%; abandonment entails a 10% penalty; and so on. Similarly, that set of rules varies in certain particulars from the provisions of the California Arbitration Act (Code Civ. Proc. §§ 1280-1294.2). Presumably an "ideal" California eminent domain arbitration agreement would preserve all features of California condemnation law except that it would provide for assessment of compensation by an arbitrator rather than a jury. Certainly the agreement would necessarily take into account the provisions of the California Arbitration Act.

Nonetheless, it seems that the most that this legislation can do is to make it very clear to the parties where they stand and leave them to draft their agreement. In preparing this statute, the staff has gone rather carefully through the Arbitration Act to determine the adaptations that might be necessary or desirable. The few adaptations reflected in the draft seem to be all that are required.

In explanation of this draft, it would seem that there should be a much simpler way to say "arbitration is authorized." The hazard in writing "authorization" statutes, however, is excluding by omission. Hence, it is probably better that the statute err by stating the obvious, rather than be incomplete.

Section 1273.01 simply authorizes the "condemnor" to submit the matter of compensation to arbitration. The term "notwithstanding any other provision of law" is probably necessary because public bodies typically

are authorized to acquire property by condemnation proceedings. Similarly, one must say "for public use," rather than "by eminent domain proceedings" because there are prescribed antecedent formalities to an officer's filing a condemnation action. Also, one must not say "compensation for the property" lest he exclude severance and other damages.

Section 1273.02 merely authorizes a public agency from whom property is being taken to arbitrate. Takings by government from government are getting to be big business and certainly this situation should be included in the statute.

Section 1273.03 leaves the matter of the expenses of the arbitration to the agreement of the parties. Here there is a temptation to try to encourage arbitration by legislative formula, but that would be inconsistent with the purely voluntary nature of arbitration and the idea behind our statute. The authorization for public agencies to defray arbitration expenses is probably necessary.

Section 1273.04 may be unnecessary, but it does indicate how arbitration would relate to judicial condemnation proceedings. The section is also calculated to make very clear the way in which the Arbitration Act would apply to eminent domain arbitration agreements.

Section 1273.05 merely leaves the important matter of abandonment to the agreement of the parties. However, a reminder as to the California condemnor's traditional privilege to abandon an acquisition after learning the amount of the award is probably desirable.

Section 1273.06 makes an arbitration agreement recordable as a means of preserving the property's status quo. This matter certainly is of importance to the condemning agencies. The quaint language of the section is that used in the many sections of the Civil Code that authorize recordation of various instruments.

The staff suggests that this statute and the preliminary portion of the recommendation be "polished" and circulated as a tentative recommendation. The Commission will recall that its recommendation on discovery in eminent domain proceedings floated around for several years before it garnered the interest and support of both sides of the condemnation fence.

Respectfully submitted,

Clarence B. Taylor  
Assistant Executive Secretary

Exhibit I

# **EMINENT DOMAIN ARBITRATION RULES**

of the

# **AMERICAN ARBITRATION ASSOCIATION**

in effect June 1, 1968



## **INTRODUCTION**

The Eminent Domain Arbitration Rules of the American Arbitration Association have been prepared in response to an expressed need for an efficient voluntary arbitration procedure designed for the unique problems involved in right of way appropriation claims. These rules are now available for use throughout the United States and may be referred to by property owners and appropriating agencies who wish to arbitrate contested claims.

Parties wishing to avail themselves of these rules may include the following clause in their arbitration agreement:

"The monetary award to be awarded to Owner shall be determined in accordance with the Eminent Domain Arbitration Rules of the American Arbitration Association, which are made a part of this agreement and shall govern the conduct of the parties hereto."

**AMERICAN ARBITRATION ASSOCIATION**

140 West 51st Street • New York, N. Y. 10020

# EMINENT DOMAIN ARBITRATION RULES

June 1, 1968

**SECTION 1. *The Instrument.*** There shall be delivered to the AAA at the time of entering into the Submission To Arbitration agreement a duly prepared, executed, witnessed and acknowledged instrument (hereinafter called "Instrument") from Owner to Agency which fully and completely specifies the rights to be acquired by the Agency. Said Instrument is delivered by Owner to Agency for the purpose of placing same in escrow with AAA or with an escrow agent selected by AAA, as hereinafter provided, to be delivered in accordance with the provisions hereof. One conformed copy of the Instrument has been attached to the Submission To Arbitration agreement and the Agency shall furnish three (3) conformed copies of the Instrument to the AAA and three (3) to the Owner.

**SECTION 2. *Name of Tribunal.*** Any Tribunal constituted by the parties for the settlement of their dispute under these Rules shall be called the Eminent Domain Arbitration Tribunal.

**SECTION 3. *Administrator.*** When parties agree to arbitrate under these Rules, or when they provide for arbitration by the American Arbitration Association and an arbitration is initiated thereunder, they thereby constitute AAA the administrator of the arbitration. The authority and obligations of the Administrator are prescribed in the agreement of the parties and in these Rules.

**SECTION 4. *Office of Tribunal.*** The general office of a Tribunal is the headquarters of the AAA, which may, however, assign the administration to any of its Regional Offices.

**SECTION 5. *Delegation of Duties.*** The duties of the AAA under these Rules may be carried out through Tribunal Administrators or such other officers or committees as the AAA may direct.

The AAA may also select any Title and/or Trust Company to act as escrow-holder of any funds or documents to be collected, administered or distributed under terms of this Agreement. The fees for such escrow service shall be paid for as provided for in this Agreement.

**SECTION 6. *National Panel of Arbitrators.*** The AAA shall establish and maintain a National Panel of Arbitrators and shall appoint Arbitrators therefrom as hereinafter provided.

**SECTION 7. *Number of Arbitrators.*** This controversy shall be submitted to three (3) arbitrators to be selected from the panels of arbitrators of the AAA. So far as practicable one arbitrator shall be an Attorney at Law; and one shall be an arbitrator whose principal source of income is derived from appraisal of real estate; and the particular area of expertise of the third arbitrator shall be in the discretion of AAA. The parties may, by written agreement attached hereto, agree that this controversy be determined by one arbitrator who shall be either an attorney or appraiser, to be appointed

as specified herein. Said three arbitrators or said one arbitrator are herein referred to as the "Arbitrator".

**SECTION 8. *Initiation Under Submission.*** The parties hereto may commence an arbitration under these Rules by filing at the nearest Regional Office of the AAA four (4) copies of a written agreement to arbitrate under these Rules and signed by the parties. It shall contain a statement of the matter in controversy, the document proposed to be obtained by Agency; the exhibits, if any, and the remedy sought together with the appropriate administrative fee as provided in the Fee Schedule.

Only the original of the documents need be signed, all other signatures can be conformed.

**SECTION 9. *Evidentiary Attachments to Arbitration Agreement.*** Either party may attach exhibits, which shall be denominated as "Agency" or "Owner" exhibits. Said exhibits shall be consecutively numbered for easy identification and reference. Such attachments may include:

No more than two (2) Owner appraisal reports

No more than two (2) Agency appraisal reports

Photos, which shall be a fair representation of what they purport to depict; limit of five (5) photos to each party.

The Agency shall prepare and submit an engineering sketch or survey, indicating configuration and approximate dimensions of Owner's lands, including buildings, trees and other material features, if any, and the approximate route and dimensions of the rights proposed to be impressed on the Owner's land by the Agency.

The Agency shall also prepare an engineering sketch or survey showing configuration and relevant details and approximate dimensions of the facilities the Agency proposes to place under, over, or upon the Owner's land.

**SECTION 10. *Fixing of Locale.*** The locale of the arbitration shall be in the county seat of the county wherein the Owner's land is located, unless mutually agreed otherwise.

**SECTION 11. *Qualification of Arbitrators.*** No person shall serve as an Arbitrator in any arbitration if he has any financial or personal interest in the result of the arbitration; or resides in the county wherein the Owner's land is located unless the parties, in writing, waive such disqualification.

**SECTION 12. *Appointment From Panel.*** The Arbitrators shall be appointed in the following manner: Immediately after the filing of the Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which he objects, number the remaining names (indicating the order of his preference), and return the list to the AAA. If a party does not return the list with-

in the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

**SECTION 13. Notice to Arbitrator of His Appointment.** Notice of the appointment of the Arbitrator shall be mailed to the Arbitrator by the AAA, together with a copy of these Rules, and the signed acceptance of the Arbitrator shall be filed prior to the opening of the first hearing.

**SECTION 14. Disclosure by Arbitrator of Disqualification.** Prior to accepting his appointment, the prospective Arbitrator shall disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator. Upon receipt of such information, the AAA shall immediately disclose it to the parties, who, if willing to proceed under the circumstances disclosed, shall so advise the AAA in writing. If either party declines to waive the presumptive disqualifications, the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules.

**SECTION 15. Vacancies.** If any Arbitrator should resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of his office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the provisions herein relating to the original appointment, and the matter shall be reheard unless the parties shall agree otherwise.

**SECTION 16. Time and Place.** The AAA shall fix the time and place for each hearing, but same shall be not sooner than ten (10) days nor more than twenty (20) days from notice to parties. The AAA shall mail to each party notice thereof at least five (5) days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

**SECTION 17. Representation by Counsel.** Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the AAA of the name and address of counsel at least three (3) days prior to the date set for the hearing at which counsel is first to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other party, such notice is deemed to have been given.

**SECTION 18. Stenographic Record.** The AAA shall make the necessary arrangements for the taking of a stenographic record whenever such record is requested by a party.

**SECTION 19. Attendance at Hearings.** Persons and their counsel having a direct interest in the arbitration are entitled to attend hearings. The Arbitrator shall otherwise have the power to require the retirement of

any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the Arbitrator to determine the propriety of the attendance of any other persons.

**SECTION 20. Adjournments.** The Arbitrator may take adjournments upon the request of a party or upon his own initiative and shall take such adjournment when all of the parties agree thereto.

**SECTION 21. Oaths.** Before proceeding with the first hearing or with the examination of the file, each Arbitrator may take an oath of office, and if required by law, shall do so. The Arbitrator may, in his discretion, require witnesses to testify under oath administered by any duly qualified person or, if required by law or demanded by either party, shall do so.

**SECTION 22. Majority Decision.** Whenever there is more than one Arbitrator, all decisions of the Arbitrators must be at least a majority. The award must also be made by at least a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

**SECTION 23. Order of Proceedings.** A hearing shall be opened by the filing of the oath of the Arbitrator, where required, and by the recording of the place, time, and date of the hearing, the presence of the Arbitrator and parties and counsel, if any. Where more than one Arbitrator is to hear the controversy, the Arbitrators shall choose one of their number to act as chairman.

The Arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. The Arbitrator may, in his discretion, make an inspection or investigation of the Owner's land, in company with both parties. Each party may comment to the Arbitrator, in the presence of the other party, on particular features of the subject matter of the controversy which they desire the Arbitrator to note. At the conclusion of the inspection or investigation, the hearing may then reconvene at the principal place of hearing.

The Owner shall then present his facts and proofs and witnesses who shall submit to questions by the Arbitrator or the other party. The Agency shall then present its facts and proof and witnesses who shall submit to questions by the Arbitrator or the other party. The Owner shall then present rebuttal testimony; and the Agency shall then present rebuttal testimony. Closing statements may be heard with Owner having the final statement. The Arbitrator may in his discretion vary this procedure but he shall afford full and equal opportunity to all parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the Arbitrator.

The names and addresses of all witnesses and identification of exhibits in order received shall be made a part of the record.

**SECTION 24. Arbitration in the Absence of a Party.** Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an ad-

jourment. An award shall not be made solely on the default of a party. The Arbitrator shall require the party who is present to submit such evidence as he may require for the making of an award.

**SECTION 25. Evidence.** The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses or documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. Rules of law of the state where the land is located shall apply as to the measure of compensation and damages and elements thereof. Where there is no legislative or appellate court determination in said state of any relevant legal question, appellate court decisions from other jurisdictions, text books and encyclopedias shall be considered as persuasive on such questions. All evidence shall be taken in the presence of all of the Arbitrators and of all the parties, except where any of the parties is absent, in default or has waived his right to be present.

Neither party shall offer any evidence of prior negotiations between the parties.

**SECTION 26. Evidence by Affidavit and Filing of Documents.** The Arbitrator shall receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as he deems it entitled to after consideration of any objections made to its admission.

All documents not filed with the Arbitrator at the hearing, but arranged for at the hearing or subsequently by agreement of the parties, shall be filed with the AAA for transmission to the Arbitrator. All parties shall be afforded opportunity to examine such documents.

**SECTION 27. Conservation of Property.** The Arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

**SECTION 28. Closing of Hearings.** The Arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the Arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 26 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the Arbitrator is required to make his award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

**SECTION 29. Reopening of Hearings.** The hearings may be reopened by the Arbitrator on his own motion, or upon application of a party at any time before the award is made. If the reopening of the hearing would

prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit.

**SECTION 30. Waiver of Oral Hearing.** The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

**SECTION 31. Waiver of Rules.** Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state his objection thereto in writing, shall be deemed to have waived his right to object.

**SECTION 32. Misarbitration.** If, in the sole judgment of the Arbitrator, any party to this agreement commits material error which frustrates the essential impartiality of the Arbitrator, a misarbitration shall be declared. Thereupon, the Arbitration panel appointed hereunder shall remove themselves, and a new panel of arbitrators shall be constituted as provided for in this agreement.

All costs incurred in the misarbitration shall be assessed against the party committing such error; or may be apportioned as the Arbitrator may direct.

The Arbitrator may, pending final determination of a new panel of arbitrators, enter such orders as he deems appropriate in the circumstances. These may include, without limitation, in case of Owner's error, an immediate right of entry by Agency onto Owner's land for the purposes stated herein; or, in case of Agency error, a monetary penalty shall be paid to Owner not to exceed \$300.00.

**SECTION 33. Extensions of Time.** The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extensions of time and its reason therefor.

**SECTION 34. Communication with Arbitrator and Serving of Notices.**

(a) There shall be no communication between the parties and any Arbitrator other than at oral hearings. Any other oral or written communications from the parties to the Arbitrator shall be directed to the AAA for transmittal to the Arbitrator.

(b) Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or his attorney at his last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportuni-

ty to be heard with regard thereto has been granted such party.

**SECTION 35. *Time of Award.*** The award shall be made promptly by the Arbitrator and, unless otherwise agreed by the parties, or specified by law, not later than fourteen days from the date of closing the hearing or reopened hearing; or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the Arbitrator.

**SECTION 36. *Form of Award.*** The award shall be in writing and shall be signed either by the sole Arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law, and shall follow the form of a jury verdict.

**SECTION 37. *Scope of Award.*** The Arbitrator shall be limited to the range of evidence in his award of a monetary amount to be paid by Agency to Owner. The parties may agree that the Arbitrator may go beyond a monetary award. The Arbitrator, in his award, shall assess arbitration fees and expenses in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA.

Interest on the award, if any, shall be computed at 6% per annum, and shall begin thirty (30) days from the date of the award or from the date of Agency entry onto Owner's land, whichever date first occurs. The Arbitrator may deny interest on any award in event Owner frustrates the arbitration.

**SECTION 38. *Award Upon Settlement.*** If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon their request, may set forth the terms of the agreed settlement in a consent award.

**SECTION 39. *Delivery of Award to Parties.*** Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to each party at his last known address or to his attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

**SECTION 40. *Procedure Upon Notice of Award.*** Within seven (7) days after receipt of the notice of the award the Agency shall, unless it exercises the option to abandon the proceedings as hereinafter provided, deliver to the escrow agent holding the Instrument the amount of the award. Upon receipt of such amount the escrow agent shall record the Instrument in the Recorder's office of the county where the real estate is located and then cause a title search to be made from the date of the evidence of title possessed by the Agency for Owner's property (which date shall be supplied to escrow agent by Agency) through the time of the recording of the Instrument. Agency shall pay for the cost of such title search. Upon return from the recorder of the Instrument same shall be delivered by the escrow agent to the Agency. If there has been no change in title and no liens filed against said property during said period, the escrow agent shall deliver the amount of the award to the Owner. Provided, that if the Agency fails to pay any of the costs due from the Agency incident to this arbitration when due,

the AAA shall notify the escrow agent to withhold the recording of the Instrument until same are paid in full. If the Owner fails to pay any of the costs due from the Owner incident to the arbitration when due, the AAA shall notify escrow agent of the amounts due and the persons to whom payment should be made and the escrow agent shall disburse the funds received from the Agency, first to said persons designated by the AAA in the amounts designated, and the balance to the Owner. Agency shall be entitled to take possession of and exercise all of the right, title and interest granted by the Instrument upon payment of the amount of the award to escrow agent.

In the event that there is any change of title or the filing of any lien or encumbrance during said period of said title examination, escrow agent shall not deliver such sum to Owner until the title change or lien has been removed. Owner agrees to so clear his title promptly. Taxes and assessments shall not be cause for delay in delivering said sum to Owner.

Alternatively, the Agency, upon receipt of the award, shall have the right and option to abandon the arbitration proceedings, provided notice of such abandonment is given within seven (7) days from such notice to AAA and Owner, and no possession of the lands of the Owner was taken and the payment by Agency of all costs and expenses of the arbitration, including without limitation, reasonable attorney fees, witness fees, arbitrator fees and payment to the Owner of an amount not in excess of ten percent (10%) of the amount the Owner would have been entitled to had the Agency not abandoned these proceedings. The Arbitrator shall be the sole judge of the reasonableness of payments under this paragraph. Upon such abandonment of arbitration by the Agency, it shall be deprived for a period of two (2) years from date of award of the right to initiate judicial proceedings to acquire the rights which were the subject matter of this arbitration on the Owner's land.

**SECTION 41. *Release of Documents for Judicial Proceedings.*** The AAA shall, upon the written request of a party, furnish to such party, at his expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

**SECTION 42. *Applications to Court.***

(a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate. However, an agreement to arbitrate shall act as a stay of judicial proceedings. Judicial appeal by the Owner subsequent to the award will not serve to defeat or stay the right of possession to the Agency.

(b) The AAA is not a necessary party in judicial proceedings relating to the arbitration.

**SECTION 43. *Lessee Rights and Duties.*** Unless it appears otherwise in this agreement, the Owner represents that no leasehold interests exist in the real estate involved in this arbitration.

Distribution of moneys between Owner and Lessee is a matter between said parties. The Agency shall not

be a party to the question of the distribution of moneys between the Owner and the Lessee. Payment of the award by Agency to the designated escrow is deemed full payment as a precondition of entry onto Owner's land.

**SECTION 44. Liens.** In the event that the subject matter of this arbitration is or becomes subject to lien prior to recording of the Instrument, any lien of record, of whatever nature, to the extent of the award, shall be satisfied by Owner; or waived by affidavit of lienholder prior to, or contemporaneous with any disbursement of funds hereunder.

In event amount of liens exceeds amount of award the Agency shall have the option to abandon this arbitration without penalty or any restriction to the bringing of an action under the law of Eminent Domain, provided, however, in such event, the Owner hereby grants to the Agency the right of immediate possession to exercise all the rights set forth in the Instrument from time of the abandonment of said proceedings until the right of possession is secured under the law of Eminent Domain.

**SECTION 45. Encumbrance of Property.** The Owner during the pendency of this arbitration shall not encumber, or permit to be encumbered, or otherwise modify title to the real estate. In the event there is an existing mortgage on the property which is the subject matter of the arbitration Owner shall, if requested by the Agency, secure from the holder of said mortgage a release or subordination thereof to the right, title and interest to be conveyed to Agency in the Instrument and deliver same in escrow along with the Instrument simultaneously with the execution of the Submission to Arbitration agreement. Said subordination agreement shall be recorded and delivered in the same manner as the Instrument. Arrangement may be made with the escrow agent to pay any amount agreed upon between the Owner and the mortgagee to the mortgagee at the time for distribution of the amount of the award.

**SECTION 46. Administrative Fees.** As a nonprofit organization, the AAA shall prescribe an administrative fee schedule and a refund schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

**SECTION 47. Fee When Oral Hearings are Waived.** Where all oral hearings are waived under Section 30, the Administrative Fee Schedule shall apply.

**SECTION 48. Expenses.** The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, shall be charged as follows: (a) If only one party requests the making of a stenographic record, then such party shall pay the costs thereof. (b) If more than one party requests a stenographic record, the costs shall be paid equally by such parties unless they otherwise agree. Such payments shall be made by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including re-

quired traveling and other expenses of the Arbitrator and of AAA representatives, and the expenses of any witness or the cost of any proofs produced at the direct request of the Arbitrator, shall be borne equally by the parties, unless they agree otherwise, or unless the Arbitrator in his Award assesses such expenses or any part thereof against any specified party or parties.

**SECTION 49. Arbitrator's Fee.** Each Arbitrator shall be entitled to be reimbursed for his service at a rate not to exceed One Hundred and Fifty Dollars (\$150.00) per diem for services within seventy-five (75) miles of where he resides or Two Hundred Dollars (\$200.00) per diem for services rendered at a distance in excess of seventy-five (75) miles from where he resides for hearing, study and preparation of award and findings, same to be assessed and apportioned as provided elsewhere in these Rules.

**SECTION 50. Deposits.** The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the Arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance.

**SECTION 51. Interpretation and Application of Rules.** The Arbitrator shall interpret and apply these Rules insofar as they relate to his powers and duties. When there is more than one Arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an Arbitrator or a party may refer the question to the AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

Whenever the context so requires, the masculine includes the feminine; the feminine the masculine; the singular the plural; and the plural the singular.

**SECTION 52. Administrative Fee Schedule.** Since no monetary amount can be stated at time of filing, the administrative fee for this arbitration is Two Hundred Dollars (\$200.00), due and payable at time of filing, and subject to adjustment in accordance with the following schedule:

Amount of Award	Fee
Up to \$10,000	3% (minimum of \$50)
\$ 10,000 to \$ 25,000	\$ 300 plus 2% of excess over \$ 10,000
\$ 25,000 to \$100,000	\$ 600 plus 1% of excess over \$ 25,000
\$100,000 to \$200,000	\$1350 plus ½% of excess over \$100,000

The percentage pertaining to the amount of awards in excess of \$200,000 may be reduced by the AAA.

If more than two parties are represented in the arbitration, an additional 10% of the initiating fee will be due for each additional represented party. The following additional charges shall be made:

Other Service Charges: Thirty Dollars payable by a party causing an adjournment of any scheduled hearing; Twenty-five Dollars payable by each.

**AMERICAN ARBITRATION ASSOCIATION, Administrator**

**RIGHT OF ENTRY**

(OPTIONAL)

Date .....

Notwithstanding the provisions of Section # ....., the Agency is hereby granted an immediate and irrevocable right of entry, onto Owner's lands, pending the final determination of this arbitration and completion of the delivery of the Instrument, together with all necessary men, vehicles, and equipment but subject to the limitation(s), and for the purposes stated in the Instrument.

OWNER

.....  
.....  
.....

# AMERICAN ARBITRATION ASSOCIATION, Administrator

## SUBMISSION TO ARBITRATION

We, \_\_\_\_\_  
Name of agency

an \_\_\_\_\_ corporation; hereinafter referred to as "AGENCY"; and \_\_\_\_\_

hereinafter referred to as "OWNER", hereby mutually agree to submit the following controversy to ARBITRATION, pursuant to the Eminent Domain Arbitration Rules of THE AMERICAN ARBITRATION ASSOCIATION (AAA).

The issue to be arbitrated is:

WHAT MONETARY AMOUNT SHALL BE AWARDED TO THE OWNER for grant by the Owner to the Agency of the Instrument, a conformed copy of which is attached hereto marked Exhibit A and made a part hereof.

This Agreement inures to, and is binding upon, the heirs, executors, administrators, successors and assigns of the parties hereto. In the event of death of owner prior to recording of the instrument, the escrow agent shall be deemed the agent of the agency coupled with an interest and the Arbitration proceeding and recording of the instrument shall proceed as if said death had not occurred, with the executor or administrator of the estate of the decedent being substituted for the decedent.

The Eminent Domain Arbitration Rules attached hereto are a part of this Submission and shall govern the conduct of the parties hereto.

IN WITNESS WHEREOF, the parties have signed their names at \_\_\_\_\_

\_\_\_\_\_, on \_\_\_\_\_ 19\_\_\_\_\_

AGENCY

OWNER

By \_\_\_\_\_

Address: \_\_\_\_\_

Its \_\_\_\_\_

ADDRESS: \_\_\_\_\_

Address: \_\_\_\_\_

And I/We, Lessee of all or part of the land involved in this Arbitration, agree to abide and be bound by the provisions of this Agreement, and have joined in the execution of the attached Instrument to subordinate my lease rights to said Instrument.

Signed at \_\_\_\_\_, on \_\_\_\_\_, 19\_\_\_\_\_

\_\_\_\_\_  
"LESSEE"

Address \_\_\_\_\_

**AMERICAN ARBITRATION ASSOCIATION, Administrator**

**AWARD FORM**

**In Matter of Arbitration**

**AAA #** .....

**Under Eminent Domain Arbitration Rules**

..... **Agency**  
..... **Owner**

**AWARD**

I/We, the Arbitrator(s) in the above captioned matter, being first duly impaneled and sworn, do make the following monetary award to Owner:

**Compensation:**

For Land or Land Rights Taken \$.....  
For Structure, if any, Taken (1) \$.....  
Damage, if any, to Residue (2) \$.....  
Total Award \$.....

The Administrative Fees and expenses of the AAA and the fees and expenses of the Arbitrator shall be borne .....

And we do so render our award, upon concurrence of our members being a majority of more of our number; and each of us signed our names at ....., on ..... 19.....

**(IF SOLE ARBITRATOR)**

And I, the sole Arbitrator, do so render my award, upon my signature at ....., on ..... 19.....

(1) exclude if no evidence of structures taken.  
(2) exclude if no evidence of damages to residue.

# AMERICAN ARBITRATION ASSOCIATION, Administrator

## ACCOUNTING

Amount of Award \$ \_\_\_\_\_  
 Expenses and Costs

**Arbitration Fees:**

Mr. A. .... days at ..... \$ \_\_\_\_\_  
 Mr. B. .... days at ..... \$ \_\_\_\_\_  
 Mr. C. .... days at ..... \$ \_\_\_\_\_

**Travel Expense:**

Mr. A. from ..... to ....., ..... miles at \$.14 \$ \_\_\_\_\_  
 Mr. B. from ..... to ....., ..... miles at \$.14 \$ \_\_\_\_\_  
 Mr. C. from ..... to ....., ..... miles at \$.14 \$ \_\_\_\_\_

Escrow Service Fee \$ \_\_\_\_\_  
 Administrative Fee \$ \_\_\_\_\_  
 Steno Record \$ \_\_\_\_\_

**TOTAL EXPENSE OF ARBITRATION** \$ \_\_\_\_\_

Apportioned Owner's Share \$ \_\_\_\_\_  
 Agency Share \$ \_\_\_\_\_  
 Amount Required of Agency to Close \$ \_\_\_\_\_  
 Less Advanced Fee \$ \_\_\_\_\_

**TOTAL AMOUNT REQUIRED AGENCY** \$ \_\_\_\_\_

**Disbursements**

Mr. A. (Fee + Travel) \$ \_\_\_\_\_  
 Mr. B. (Fee + Travel) \$ \_\_\_\_\_  
 Mr. C. (Fee + Travel) \$ \_\_\_\_\_

Escrow Company \$ \_\_\_\_\_  
 AAA \$ \_\_\_\_\_  
 Steno Company \$ \_\_\_\_\_

**OWNER:**

GROSS AMOUNT \$ \_\_\_\_\_  
 Less Share/Expense \$ \_\_\_\_\_  
 Net Balance Due Owner \$ \_\_\_\_\_ \$ \_\_\_\_\_

**APPROVED:**

\_\_\_\_\_  
 AAA  
 By \_\_\_\_\_

\_\_\_\_\_  
 Escrow Company

February 26, 1969

STATE OF CALIFORNIA  
CALIFORNIA LAW  
REVISION COMMISSION  
TENTATIVE RECOMMENDATION

relating to

ARBITRATION IN ACQUISITIONS OF PROPERTY  
FOR PUBLIC USE

CALIFORNIA LAW REVISION COMMISSION  
School of Law  
Stanford University  
Stanford, California 94305

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

#### NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

A specific consequence of California's traditional "jury trial" approach to the law of eminent domain has been a marked lack of experimentation with other methods for determining "just compensation." The only exceptions to jury trial in California law are (a) the little-used procedure for determining the value of public utility property by the Public Utilities Commission;<sup>3</sup> (b) provisions for voluntary reference of the issue of compensation to "referees" in a few of the early improvement acts;<sup>4</sup> and (c) the provisions in the Code of Civil Procedure for factual determinations by referees in civil litigation generally.<sup>5</sup> In contrast, other jurisdictions have experimented extensively with alternatives to jury trial. At the time Rule 71a of the Federal Rules of Civil Procedure was adopted in 1951, throughout the United States there were more than 300 distinguishable procedures for assessing compensation in connection with the taking of property.<sup>6</sup>

In recent years, the idea has evolved that one practicable alternative to jury trial would be voluntary arbitration of the issue of compensation.<sup>7</sup> Although California has had no reported experience with arbitration in this connection, there appears to be a substantial interest in this alternative in other parts of the United States. Last year, the American Arbitration Association published a set of "Eminent Domain Arbitration Rules" in response

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3. See Cal. Const., Art. XII, § 23a; Pub. Util. Code §§ 1401-1421.
  4. E.g., The Street Opening Act of 1903 (Cal. Sts. & Hwys. Code §§ 4000-4443) and The Park and Playground Act of 1909 (Cal. Govt. Code §§ 38000-38213).
  5. Section 1248 of the Code of Civil Procedure refers to the assessment of compensation by the "court, jury, or referee." The mention of "referees" alludes to Sections 638-645 which provide generally for referees and trials by referees.
  6. See the notes of the Advisory Committee on Rules of Civil Procedure, 28 U.S.C. § 2070 (1952).
  7. See Aksen, Arbitrating Right-of-Way Disputes, 14 Right of Way 47 (1967); Latin, The Arbitration of Eminent Domain Cases, 14 id. 57.

to an expressed need for an efficient arbitration procedure adaptable to condemnation cases. Unfortunately, neither the issuance of those rules nor any other private activity can overcome the impediment that exists to arbitration of compensation in California. Under existing law, the obstacle to arbitration appears to be the lack of any clear authority on the part of governmental entities and agencies to submit the issue of compensation to arbitration. The hundreds of California statutes that authorize acquisition of property for public use do not contemplate that practice. The typical provision authorizes acquisition by purchase "or by proceedings had under the provisions of title seven, part three, of the Code of Civil Procedure,"<sup>8</sup> and thereby seemingly compels resort to judicial proceedings.

Before 1961, an additional obstacle existed to arbitration. California judicial decisions had excluded valuations and appraisals from the coverage of the arbitration statute on the general grounds that they do not involve a "controversy" and, moreover, that the parties do not necessarily contemplate either a formal hearing or the taking of evidence.<sup>9</sup> In revising the California Arbitration Act in 1961, the Legislature took care to assure that enforceable arbitration agreements include "agreements providing<sup>10</sup> for valuations, appraisals, and similar proceedings." This oblique

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8. See, e.g., Cal. Civil Code § 1001. On the other hand, the only California statute that seems definitely to require judicial assessment of compensation is The Property Acquisition Law (Govt. Code §§ 15850-15866) which authorizes the Public Works Board to acquire property for the general purposes of state agencies. That act, however, permits the board to agree with the owner as to the compensation to be paid and to incorporate that agreed figure in a stipulation in the condemnation proceeding (Govt. Code § 15857).

9. E.g., *Bewick v. Mecham*, 26 Cal.2d 92, 156 P.2d 757 (1945).

10. See Cal. Code Civ. Proc. § 1280. See also Recommendation and Study Relating to Arbitration, 3 Cal. L. Revision Comm'n Reports, G-1, G-34 (1961).

approval of the arbitration of valuation questions, of course, was insufficient to generate any interest in the arbitration of condemnation cases.

#### RECOMMENDATION

The Commission believes that voluntary arbitration of the issue of compensation can become a useful alternative to the rather awkward determination of that issue by jury trial. Certainly, there is nothing sacrosanct about jury-determined valuation figures or the process by which they are reached. Inasmuch as "value" is determined solely from the opinions expressed by expert witnesses and the owner, the amounts determined by professional arbitrators might be considered more "reliable" and might even prove more satisfactory in the long run to both condemnors and condemnees.

The Commission recognizes that voluntary arbitration certainly is not "the answer" to the need for improvements in California condemnation procedure. Indeed, both condemning agencies and property owners may continue to display their traditional preference for jury assessment of compensation however clearly arbitration may be authorized and however practicable the arbitration process may be made to appear. Nonetheless, as long as resort to arbitration is authorized on a purely voluntary basis and the content of the arbitration agreement is left to the parties, arbitration might prove to be a valuable alternative to judicial proceedings notwithstanding that substantial changes may be made in both the substantive and procedural aspects of California's condemnation law. In short, the parties can be expected to adapt the terms upon which they are willing to arbitrate, and the particular content of their arbitration agreement, in accordance with those changes.

The Commission therefore recommends enactment of statutory provisions that will explicitly authorize California condemnors to submit the issue of compensation to arbitration. Public entities and agencies from whom property is taken should be given a similar authority. The legislation should leave the matter of the expenses of the arbitration to the parties, but public agencies should be clearly authorized to defray those expenses or their share of them. It should be made clear that agreements to arbitrate compensation are subject to, and enforceable under, the California Arbitration Act. In addition, the legislation should anticipate and resolve questions that might arise as to the effect of an agreement to arbitrate upon the condemnor's power to file an eminent domain proceeding, to abandon the acquisition, and the like. Lastly, the statute should authorize recordation of arbitration agreements as a means of preventing conveyance or encumbrance of the property pending arbitration and passage of title to the acquirer.

#### RECOMMENDED LEGISLATION

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to add Chapter 3 (commencing with Section 1273.01) to Title 7 of Part 3 of the Code of Civil Procedure, relating to the acquisition of property for public use.

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

Section 1. Chapter 3 (commencing with Section 1273.01) is added to Title 7 of Part 3 of the Code of Civil Procedure, to read:

CHAPTER 3. ARBITRATION OF COMPENSATION IN  
ACQUISITIONS OF PROPERTY FOR PUBLIC USE

Section 1273.01. Arbitration authorized; acquisitions of property for public use

1273.01. Notwithstanding any other provision of law, any person, including any public entity, agency, or officer, authorized to acquire property for a public use for which the property may be taken by eminent domain proceedings may

(a) Enter into an agreement to submit to arbitration any controversy as to the compensation to be made in connection with acquisition of the property; and

(b) Submit any such controversy to arbitration in accordance with the agreement.

Comment. Chapter 3 is added to provide explicit authority for submission to arbitration of any issue of "just compensation." Section 1273.01 gives such authority to the acquirer; the following section confers a reciprocal authority upon any "person" from whom property is being acquired. See Recommendation Relating to Arbitration in Acquisitions of Property for Public Use, \_\_\_ Cal. L. Revision Comm'n Reports 000 (19\_\_).

Addition of this authority does not imply that arbitration was not authorized, or was precluded, before enactment of this chapter. Neither does this chapter imply that public entities, agencies, and officers authorized to purchase, but not to condemn, property are not authorized to agree to arbitration. Rather, this chapter authorizes arbitration in connection with or in lieu of eminent domain proceedings and leaves unaffected any other cases in which arbitration may be available.

Section 1273.01 includes all public entities (for an encompassing definition of "public entity," see Section 811.2 of the Government Code), but refers to the particular agency, officer, commission, or board authorized

to acquire property on behalf of the entity. With respect to the State of California, for example, authorizations to acquire property for specified purposes are conferred upon specific agencies and officers, such as the Department of Public Works, the Department of Water Resources, the Property Acquisition Board, and the Director of Aeronautics. The terms "agency" and "officer" in Section 1273.01 refer to these authorized acquirers and similar instrumentalities of local governmental entities.

Section 1273.01 does not imply that the entity, agency, or officer must have complied with the formalities (such as the adoption of an ordinance or resolution) frequently prescribed as conditions precedent to the commencement of an eminent domain proceeding. Rather, the section contemplates that the question of compensation may be submitted to arbitration whenever acquisition is authorized in the manner followed by the particular entity or agency in authorizing purchases of property.

The term "compensation to be made in connection with an acquisition" is intended to encompass any amounts that may be assessed or awarded in a condemnation proceeding and, specifically, to include severance or other damages.

The term "controversy" is defined, for purposes of arbitration, in subdivision (c) of Section 1280.

Section 1273.02. Arbitration authorized; takings of public property

1273.02. Notwithstanding any other provision of law, any person, including any public entity, agency, or officer, authorized to convey property for a public use for which the property may be taken by eminent domain proceedings or to compromise or settle the claim arising from a taking of such property, may

(a) Enter into an agreement to submit to arbitration any controversy as to the compensation to be received in connection with such a conveyance or claim; and

(b) Submit any such controversy to arbitration in accordance with the agreement.

Comment. Section 1273.02 extends the authorization provided by this chapter to include "persons" who own, hold, or control public property that may be taken by eminent domain proceedings. Public property may be taken by eminent domain proceedings whether or not it is already "appropriated to a public use" (see Sections 1240 and 1241), and intragovernmental condemnation proceedings are a common phenomenon. As is the case with Section 1273.01, Section 1273.02 encompasses all public entities, but refers to the particular agency, board, commission, or officer authorized to convey public property or to compromise or settle the claim for compensation that arises from its being taken.

Section 1273.03. Expenses of arbitration; agreement may provide for payment

1273.03. Notwithstanding Sections 1283.2 and 1284.2, an agreement authorized by this chapter may provide for the payment by either party or for the proration of the costs and expenses of arbitration, including witness fees or other expenses incurred by a party for his own benefit. An agreement also may provide that the arbitrator or arbitrators may allow such costs and expenses in favor of any party to the arbitration. The person or entity acquiring the property may defray such costs and expenses from funds available for the acquisition of the property or other funds available for the purpose, and the person or entity relinquishing the property may defray such costs and expenses from the award or from other funds available for the purpose.

Comment. Arbitration agreements typically provide for the payment or allocation of expenses incident to the arbitration, and such provisions generally are effective. See Olivera v. Modiano-Schneider, Inc., 205 Cal. App.2d 9, 23 Cal. Rptr. 30 (1962). If an agreement authorized by this chapter were patterned after the rule applicable to eminent domain proceedings, the person from whom the property is being acquired would be entitled to recover all "taxable costs." See Oakland v. Pacific Lumber & Mill Co., 172 Cal. 332, 156 Pac. 468 (1916); City & County of San Francisco v. Collins, 98 Cal. 259, 33 Pac. 56 (1893). However, Section 1283.2 seemingly requires each party to an arbitration to bear the witness fees and mileage of his own witnesses. Similarly, Section 1284.2 does not provide for the award of "expenses incurred by a party for his own benefit." Section 1273.03 permits the contracting parties to govern by

§ 1273.03

their agreement the award of these items, as well as all other expenses of the arbitration, including the fees of arbitrators and professional arbitration associations. The last sentence of the section is included to assure that any party to the agreement is authorized to defray such costs and expenses from the funds available for acquisition of the property, from the award, or from other funds available for the purpose.

Section 1273.04. Effect and enforceability of agreements

1273.04. Except as specifically provided in this chapter, agreements authorized by this chapter are subject to Title 9 (commencing with Section 1280) of this part. Such an agreement may be made whether or not an eminent domain proceeding has been commenced to acquire the property. If an eminent domain proceeding has been commenced, or is commenced, any judicial proceedings relating to the arbitration shall be filed in the eminent domain proceeding. Notwithstanding Section 1281.4, an agreement made under the authority of this chapter does not waive or restrict the power of any person or entity to commence and prosecute an eminent domain proceeding, including the taking of possession prior to judgment, except that upon motion of a party to the eminent domain proceeding, the court may stay the determination of compensation until any application for an order to arbitrate is determined and, if arbitration is ordered, until arbitration is had in accordance with the order. Notwithstanding the rules as to venue provided by Sections 1292 and 1292.2, any judicial proceedings relating to an arbitration authorized by this chapter may be filed in the superior court in the county in which the property, or any portion of the property, is located.

Comment. Section 1273.04 makes it clear that, in general, agreements to arbitrate an issue of compensation are subject to the arbitration statute (Sections 1280-1294.2). The section makes minor adaptive changes in the application of that statute to such agreements.

§ 1273.04

The section also makes it clear that an eminent domain proceeding may be begun and prosecuted notwithstanding an agreement to arbitrate the question of compensation. There are, of course, constitutional obstacles to any attempt to "contract away" the power to take property by eminent domain. There would appear to be no objection, however, to staying the determination of compensation in an eminent domain proceeding pending an agreed arbitration. That practice is provided for as to other arbitrations by Section 1281.4. This provision of Section 1273.04 may allay the fears of condemnors that entry into an agreement to arbitrate may impair or delay the condemnor's power to take the property or to take "immediate possession." If an eminent domain proceeding is pending, good sense dictates that any judicial proceedings as to the arbitration or award should be brought in the eminent domain proceeding. The section also contemplates that, if an eminent domain proceeding is pending, the award, whether confirmed (see Section 1287.4) or not confirmed or vacated (see Section 1287.6) may be entered as the amount of compensation in the judgment of condemnation. See Cary v. Long, 181 Cal. 443, 184 Pac. 857 (1919); In re Silliman, 159 Cal. 155, 113 Pac. 135 (1911). The last sentence of the section permits judicial proceedings relating to the arbitration to be brought in the county in which the property lies, in addition to the other counties specified in Sections 1292 and 1292.2. This additional venue corresponds with the rule as to venue for eminent domain proceedings. See Section 1243.

Section 1273.05. Abandonment of acquisition; consequences of abandonment

1273.05. An agreement authorized by this chapter may specify the privilege, if any, of the party acquiring the property to abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding that may have been, or may be, filed. Unless the agreement otherwise provides, the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding within the period for filing and serving a petition or response to vacate an arbitration award under Sections 1288 and 1288.2. The agreement may also specify the costs and expenses, if any, to be awarded the party from whom the property was to be acquired. Unless the agreement otherwise provides, that party shall be entitled to all of his costs and expenses of the arbitration, including without limitation, reasonable attorney fees, appraisal fees, and fees for the services of other experts, and the amount of such costs and expenses may be determined by the arbitrator or arbitrators and be included in their award.

Comment. Section 1273.05 permits the parties to the agreement to deal with the privilege to abandon the acquisition and to specify the consequences of abandonment. For the remote case in which the agreement would not cover the privilege to abandon, the section permits the party who was to have acquired the property to abandon within the time within which a petition or "response" to vacate an award may be filed and served. Generally this period is 100 days after service of the award or ten days after service of a petition to confirm an award. See Coordinated

§ 1273.05

Constr., Inc. v. Canoga Big "A," Inc., 328 Cal. App.2d 313, 47 Cal. Rptr. 749 (1965). The section also makes it clear that the agreement may specify the costs and expenses, if any, that are to be awarded to the "condemnee" in the event of abandonment. The expenses made recoverable in the absence of agreement are generally those specified in Section 40 of the Eminent Domain Arbitration Rules of the American Arbitration Association (June 1, 1968), except that no provision is included for payment of "an amount not in excess of ten-percent (10%) of the amount the Owner would have been entitled to had the Agency not abandoned these proceedings." In the absence of agreement, of course, if an eminent domain proceeding has been filed, the abandonment of that judicial proceeding and the recovery of expenses in that proceeding would be governed by Section 1255a, rather than by Section 1273.05. In determining the "expenses reasonably and necessarily incurred" in that proceeding, the court undoubtedly would take into account the arbitration award of costs and expenses, and preclude duplicate recovery of the same expenses.

Section 1273.06. Recordation of Agreements

1273.06. Agreements authorized by this chapter may be acknowledged and recorded in the same manner and with the same effect as conveyances of real property.

Comment. Section 1273.06 permits the agreements authorized by this chapter to be acknowledged and recorded to afford "constructive notice" to subsequent purchasers and lienors. Arbitration rules may provide for the escrowing of an instrument of transfer (see, e.g., Sections 1, 44, and 45 of the Eminent Domain Arbitration Rules of the American Arbitration Association (June 1, 1968)), but such an escrow does not, of itself, protect the "condemnor" against subsequent transferees. This section provides a means for obtaining such protection (see Civil Code Sections 1213-1220) and is calculated to make unnecessary the filing of an eminent domain proceeding for no purpose other than to obtain the effect of a lis pendens.