

Date of Meeting: November 7-8, 1958

Date of Memo: October 23, 1958

Memorandum No. 1

Subject: Study #32 - Arbitration - Report of Discussion With
Chairman of Commission on Uniform State
Laws

Pursuant to the suggestion made at the October meeting, Mr. Stanton and I met with Martin Dinkelspiel, Chairman of the Commission on Uniform State Laws to discuss various problems presented by the arbitration study. Mr. Stanton pointed out the considerable difficulty which the Commission would have in completing its work on the arbitration study in time to present a report on this subject to the 1959 Session of the Legislature. Mr. Dinkelspiel indicated that he did not believe that his Commission would wish to go forward with the Uniform Arbitration Act in 1959 if to do so would embarrass or create special difficulties for the Law Revision Commission. At the end of the discussion, Mr. Dinkelspiel proposed the following: the Commission on Uniform State Laws will introduce the Uniform Act early in the 1959 Session but will not move the bill unless, prior to the end of the Session, the Law Revision Commission is able to complete its work on the arbitration study and is ready to report to the Legislature. Mr. Dinkelspiel stated that whenever the Commission had advanced its work on the arbitration study to the point of having drafted a proposed statute he would hope that he and his Commission could meet with the Law Revision

Commission to discuss the differences between the Uniform Act and the Law Revision Commission bill with a view to reaching agreement upon a bill that both groups would be prepared to recommend if this be possible. In this connection, Mr. Dinkelspiel stated that he would personally not be opposed to various changes in the Uniform Act which, while retaining the principal features of the Act and thus what he regards as the considerable advantage of uniformity, would incorporate such changes in the Act as the Commission's arbitration study might indicate would be desirable. By way of illustrating the possible scope of the change he has in mind, Mr.

Dinkelspiel stated that he would not personally be averse to revising the Uniform Act to cover both oral agreements to arbitrate and agreements for appraisals if he were persuaded on the merits of the soundness of doing so.

Mr. Stanton and I indicated that we would report this conversation to the Commission and recommend that the Commission agree to the proposal made by Mr. Dinkelspiel. This would have the several advantages of (1) keeping the arbitration study on our current agenda thus capitalizing on the momentum which it now has, (2) making available to the Commission the informed views of the Commission on Uniform State Laws on the various problems involved (Mr. Dinkelspiel took a substantial part in the work of the Conference on this Act), (3) opening the way for possible agreement by the two commissions on a single bill, (4) assuring that the Uniform Act will not be pressed in 1959 if the Commission cannot complete its study during the current Session, and (5) avoiding or minimizing the possibility of a head-on collision between the two commissions before the Legislature, at least during the 1959 Session. We agreed that we would report this discussion to the members of the Commission immediately. Mr. Stanton

asks each of you to write him at once if you disagree with this proposed course of action.

Mr. Stanton and I agreed after our meeting with Mr. Dinkelspiel that, given the substantial agenda in prospect for the November meeting and the necessity of putting several studies in final (or relatively final) shape for their presentation to the Senate Interim Judiciary Committee late in November, we should not ask Mr. Kagel to attend the November meeting nor should we devote any substantial part of that meeting to discussion of his study and proposed revision of the California Arbitration Statute. We believe, however, that it would be desirable at the November meeting, if time permits, for the Commission to spend an hour or so discussing Mr. Kagel's study generally and making suggestions to be relayed to him concerning ways in which the study might be improved. To this end, we ask that you read the study carefully before the meeting and make notes of your ideas for its improvement.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

November 4, 1958

MEMORANDUM

TO: John R. McDonough, Esq.
Secretary of the California State Law Revision Commission

FROM: Sam Kagel, Esq.

SUBJ: General Comparison of proposed revision in the California
Arbitration Statute with the provisions of the Uniform
Arbitration Act.

This memorandum does not pretend to be a detailed study. It is only a series of notes.

The comparisons between the California Revision and the Uniform Act only refer to the more general, basic differences and similarities. As of the date of this memorandum, the Commission has not yet settled upon the final language of its proposed statute. Until this is done, a detailed comparison cannot be made.

Section 1 of the California Revision (Section 1280 CCP) and Section 1 of the Uniform Act.

The provisions relative to the validity of arbitration agreements are basically the same. The California Revision is specific, however, in providing that the statute is to apply to both oral and written agreements. It's also specific in defining "controversy" in accordance with California Case Law.

The California Revision specifically includes valuations and appraisals. This is not provided for in the Uniform Act.

The California statute specifically states that common law arbitration is abolished. No reference to this is made in the Uniform Act.

The California Revision specifically includes labor arbitration. The Uniform Act provides that the legislature may permit parties to exempt themselves from the statute. The undesirability of such a provision is discussed in my report of November, 1956 submitted to the commission.

Section 3 of the California Revision (Section 1282 CCP)
Section 2 of the Uniform Act.

The more important difference between the Revision and the Uniform Act is that the California Revision specifically provides that

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the court may find a waiver of the right to arbitrate. The Uniform Act provides for a stay of an arbitration proceeding. This is not contained in the California Revision.

Section 4 California Revision (Section 1283 CCP) Section 3 Uniform Act.

There are substantial differences between these sections. The California Revision specifically provides the method by which the court shall appoint an arbitrator. The court will be required to set up a panel of nominees obtained from the parties and from public and private organizations concerned with arbitration. After such a panel is set up, the parties will be given a final opportunity to make their own selection and if they fail, the court shall then appoint from the panel of nominees. No such procedure is provided in the Uniform Act.

Section 5 California Revision (Section 1284 CCP) Section 4 of Uniform Act.

Both acts provide for majority action by arbitrators. However, the California provision is specific in providing that reasonable notice of all proceedings required to carry out their duties must be given to all arbitrators.

Section 6 California Revision (Section 1285 CCP) Section 5 of Uniform Act.

The two acts are similar in that they provide that the arbitrators shall appoint time and place for the hearing. The California Revision provides for ten days notice instead of five.

An important difference is that the California Revision provides for a default award only if the court has first issued an order to arbitrate. (See Section 6a (5) of the California Revision).

The California Revision includes a codification of the California Case Law relative to the application of rules of evidence.

Finally, the California Revision includes a most important difference in that the neutral arbitrator may not obtain information, advice, or evidence outside the presence of the parties without first obtaining their consent.

The provision appearing in the Uniform Act Section 7 relative to witnesses, subpoenas, and deposition are in many details the same as Section 6 of the California Revision. However, the California Revision specifically ties in other applicable California statute acts dealing with witnesses. The disobedience to a subpoena in the California Revision is handled in accordance with California law and statute.

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Section 7 California Revision (Section 1286 CCP) Section 8 of the Uniform Act.

The only difference here is a provision that in the California Revision any application for modification or correction of the award by the arbitrator must be made within twenty-five days of the delivery of the award to the applicant.

Section 9 of the Uniform Act provides for changes of the awards by arbitrators. This appears in Section 7c of the California Revision.

Section 8 California Revision (Section 1287 CCP).

There is no basic difference in this provision between the California provision and the Uniform Act.

Section 9 California Revision (Section 1288 CCP) Section 12 Uniform Act.

These provisions deal with vacating an award. In most respects they are similar to the Uniform Act. There is a difference with reference to arbitrators rehearing a case.

Section 10 California Revision (Section 1289 CCP) Section 13 Uniform Act.

These provisions are almost identical.

Section 11 California Revision (Section 1290 CCP).

This section is different from the Uniform statute in that it draws together in a single section matters pertaining to courts and venue.

Section 12 California Revision (Section 1291 CCP) Section 14 Uniform Act.

These provisions are basically the same in both California Revision and the Uniform Act.

Section 13 California Revision (Section 1292 CCP) Section 19 Uniform Act.

These provisions dealing with appeals are the same.

Section 14 California Revision.

This is a new provision in the California statute providing for the securing of jurisdiction of out-of-state parties.

m. f.

Proposed Section of Minutes for November,
1958 Meeting of California Law Revision
Commission

Study No. 32 - Arbitration: The Commission discussed Mr. Kagel's study generally with a view to making suggestions to be communicated to him concerning ways in which the study might be improved. In the course of the discussion the following conclusions were reached:

1. Mr. Kagel's current study (with its Appendix consisting of his original comparative study of the California Arbitration Statute and the Uniform Arbitration Act) appears to raise the principal issues with which the Commission must be concerned in considering recommendations for changes in the present law. Moreover the issues appear, on the whole, to be helpfully analyzed from a substantive point of view.

2. The study is, however, somewhat deficient in terms of presentation and analysis of primary and secondary authority (cases, statutes, texts, law review articles, etc.) on the issues presented and discussed. The Commission believes that it would be better able to consider and decide many of the questions involved if it were better informed as to the law of other states and of the views of writers in the field.

3. The Commission believes that the current study would be improved if its format were considerably changed. The study takes the form of a series of legislative proposals, each followed by what amounts to a series of explanatory notes. The proposals themselves are somewhat difficult to read owing to the fact that they are in the form of proposed amendments to existing code sections. At the same time, when a proposal is under

discussion it is necessary to turn back from the text to the proposal in order to follow the discussion. Moreover, this format tends to limit the extent and quality of the substantive analysis which can be brought to bear, even on the more difficult policy considerations presented, because it is in the form, substantially, of draftsman's notes. The Commission believes that a more satisfactory study would be produced if it took the form of discussion of questions or problems under a series of major headings, the discussion of each subject following more or less this form: statement of question, analysis of existing law (California and other), statement of pros and cons on policy issues involved, statement of conclusion reached, and proposal of statutory language to implement conclusion.

4. Without wishing to impose any specific requirement in terms of format, the Commission suggests that consideration be given to reorganizing the study somewhat along the following line:

I. Introduction (To provide background and to set stage and context for study.).

- A. What arbitration is. What the policy of State toward arbitration should be (herein arguments for, arguments against, conclusion).
- B. What State should do if decides to encourage and support arbitration: make agreements valid; make specifically enforceable by expeditious procedure; give arbitrator adequate powers (subpoena, power enter default judgment etc.); provide for expeditious enforcement of award; provide for very narrow judicial review of proceeding and

award.

C. History of arbitration

Herein of	(In England and U.S. generally.	
principal)	In California:	
differences	(Pre-1927	
between Common)	1927 Act	(General statement of history
law and Statu-	(1927 - date	(of decisions interpreting Act)
tory arbitra-)		
tion			

D. What is now needed - i.e., study of whether changes in present law are necessary or desirable, in light of 1927 Act and decisions thereunder, legislation and decisions of other states, promulgation of Uniform Act and proposal for its enactment in California.

II. What Agreements for Settlement of Dispute by Reference to Third Person Should Be Covered by California Legislation on Arbitration.

A. Overall conclusion: all such agreements should be valid and specifically enforceable.

B. Discussion of possibility of excluding:

- 1) Oral agreements
- 2) Agreements between employers and employees and their representatives
- 3) Valuations, appraisals and other similar proceedings

C. Should agreements not within statute be made invalid - neither agreement nor third person's decision enforceable?

III. By What Procedures and Devices Should Valid Agreements To Arbitrate Be Made Binding on Parties - i.e., Specifically Enforceable.

A. Summary procedure to compel arbitration (herein of whether petitioner has to show breach, of waiver, of what defenses court should be able to consider (including defense of no agreement to

arbitrate this question), of whether should have right to jury trial.

B. Stay of civil actions pending arbitration.

C. Procedure for naming arbitrator if parties fail to do so.

IV. Conduct of Arbitration Proceedings.

A. Rights of parties (herein of notice, right to be heard and cross-examine witnesses, etc.).

B. Powers of arbitrators (herein of distinction between "neutral" and "party" arbitrators, of whether less than all can act, of power to proceed in absence of party, of power to administer oaths and issue subpoenas (and enforcement of same), of power to obtain information except in hearing).

C. Payment of expenses of proceeding.

V. Making and Enforcement of Arbitration Award.

A. Making of award (herein of time limitation on arbitrator, form of award, delivery to parties)

B. Modification of award by arbitrator.

C. Procedure for enforcement of award (herein of grounds for modification or denial of enforcement).

D. Procedure for setting aside award (herein of limited extent to which court should be empowered to review award and of disposition of matter if award is set aside).

E. Modification of award by court.

VI. Miscellaneous

A. Jurisdiction and venue of proceedings authorized.

B. Procedure (notice, papers, etc.) in proceedings authorized.

C. Enforcement of judgment on award.

D. Appeals