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Memorandum No. 5

Subject: Study #32 - Arbitration

Attached is another installment on the above study.

Respectfully submitted,

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(Study 32 - Arbitration
Part II - Scope)

7/17/59

MATTERS SUBJECT TO ARBITRATION

We have already concluded that as a general matter arbitration is a socially desirable method of settling disputes; that to make it effective and facilitate its use expeditious judicial enforcement of agreements to arbitrate both present and future disputes should be provided; and that such procedure should involve a minimum of court involvement in the controversy on its merits. It should be noted, however, that arbitration does not always appear to serve the same function; or at any rate, there are those who have taken radically differing views as to the nature and function of the process under different conditions. In some situations, for example, it is used essentially as a quicker, cheaper substitute for the courts, in which the parties may pick their own judge, but in which problems identical to those which would be presented to a court are submitted for decision and in the determination of which the arbitrator is expected to apply established legal principles, or perhaps "customs of the trade." On the other hand, arbitration may serve not as a substitute for a court but rather as a special kind of intra-institutional decision making process, performing functions which courts do not and are not equipped to perform. In some situations the parties themselves, correctly or incorrectly, may regard arbitration

as somewhat akin to mediation and view arbitrators less as "judges" than as "agents" appointed by the parties to arrive at a settlement and adjustment of their interests.

Thus, the next question discussed herein is whether there are kinds of arbitration agreements or types of controversies which, because of their nature, should not be enforced or which present such peculiar problems that special, separate statutory provisions would be advisable. In approaching this question we should bear in mind that the practical effect of statutory provisions such as those suggested above is to clothe the arbitrator with the power of the state, to give him jurisdiction over the dispute and to provide for enforcing this jurisdiction by summary court procedures. Other remedies which might otherwise be relied upon -- whether they be a trial on the merits by a court of law or resort to self-help -- are thus denied to the parties.

Formal Requirements

Earlier arbitration statutes and those in effect today in many jurisdictions required specified formal steps to be taken before an arbitration agreement became enforceable, such as filing the submission agreement with the court, or having the agreement made a "rule of court." Such requirements are not found in the more modern statutes and are not appropriate to laws aimed at facilitating and encouraging the use of arbitration.

One formality required by the arbitration statutes of all jurisdictions, however, including California, is that the agreement to arbitrate be in writing.[99] This is also true of the Uniform Arbitration Act.[100] The reason for this limitation appears to be a recognition of the fact that where agreements to arbitrate are enforced the parties are irrevocably deprived of the right to subject their dispute to a court of law to be tried on the merits according to established legal principles. Thus the Commissioners on Uniform State Laws considered it "unwise to permit an irrevocable arbitration agreement to be left to the uncertainties of a claimed oral transaction."[101] It may be argued, however, that the question is really one of evidence and proof. If it can be established that the parties have in fact orally agreed on arbitration, intending to be bound, there is no real reason why their agreement should not be enforced. It does not appear why an arbitration agreement is any more "uncertain" than many other kinds of important oral understandings which are enforced. The requirement of the formality of a writing may possibly be justified, however, on the ground that it does serve to protect the parties themselves from entering too casually into an enforceable agreement which might deprive them of important legal rights.

If oral agreements are not to be included within the scope of an arbitration statute, the question remains whether such agreements are to be in any way operative. At common law there was no requirement that an agreement to arbitrate be in writing. In many if not most jurisdictions arbitration statutes have been viewed as merely providing an alternative procedure to that existing at common law. Thus,

even though a particular arbitration agreement may not come within the provisions of the statute, common law principles, limited though they may be, have been held to apply in such jurisdictions.[102] In California, however, the courts have stated that by enactment of the present arbitration statute the legislature intended to adopt a comprehensive all-inclusive statutory scheme applicable at least to all written agreements to arbitrate, and to abolish in such cases common law doctrines applicable to arbitration.[103] The question of the application of such common law principles to oral agreements in California is left somewhat uncertain. There is at least one decision,[104] however, which seems to suggest that awards resulting from such agreements may be enforced. The general question whether as a matter of principle the California arbitration statute should expressly abolish all common law doctrines as to arbitration will be discussed below.

Questions of Law

The courts are ordinarily regarded as the instrumentalities best equipped to decide questions of law. Yet there appears to be no reason why the parties to a dispute may not, if they see fit, agree to submit such questions to the decision of an arbitrator and agree to be bound by his decision.

Agreements to arbitrate matters of law should be enforced in the same manner as agreements to arbitrate any other question. As a practical matter, to do otherwise would largely defeat the purpose

of an arbitration statute. Many, if not most matters submitted to arbitration involve questions of "law" as well as "fact"; that is, the arbitrator is expected to determine what principles are to govern the parties' dispute as well as the facts to which the principles will be applied. These principles may or may not be those a court would apply to the case. Indeed, an important motive for agreeing to arbitration may often be a desire to avoid the application of strict legal principles and to have the case decided on the basis of "trade customs" or "basic principles of justice" keyed to the interests of the group or institutional surroundings of the parties.

At common law no distinction was made between questions of law and fact submitted to arbitration.[105] The California arbitration statute has been held to apply to disputes involving matters of either law or fact. In Pacific Indemnity Co. v. Insurance Co. of North America[106] the argument was unsuccessfully made that "disputes as to the legal construction or wording of contracts" were not such disputes as could be submitted under the California statute. In rejecting this argument the court stated: "This section is broad enough to authorize the submission of any and all questions arising under a contract, whether such questions relate to the construction of the contract or to questions of law or fact arising thereunder.[107]

Nonjusticiable Disputes

It has already been pointed out that arbitrations are often not merely substitutes for law suits. Many disputes which are in

fact submitted to arbitration involve matters which could not be submitted to a court at all. So long as such disputes are "quasi-judicial" in nature, consisting of the same kind of dispute as a court might hear, even though the specific matter could not in fact be sued upon, there are few theoretical problems in providing for their enforcement. Quite often, however, such disputes relate not to a construction of the "rights" of the parties under an existing contract or on the basis of existing laws or rules, but rather to matters which affect, or actually determine "interests" as between the parties. For example, parties to a partnership agreement or close corporation agreement may agree that in case of deadlock as to business policy or as to the appointment or removal of officers or directors the matter will be submitted to arbitration.[108] Or, in the case of collective bargaining the parties may agree to submit questions such as wage scales or the provisions of the collective bargaining contract itself to a decision by arbitration. It has been argued that this non-justiciable "interest" arbitration is not arbitration at all -- that real arbitration "would properly seem to imply the disposition of a dispute in accordance with some standard -- possibly a law, a trade practice or a provision in a contract -- which the parties to the dispute concede to exist, although they cannot agree upon what it means or how it is to be applied in a particular case."[109] Whether or not the meaning of the term may be legitimately so limited, the lack of any fixed criteria or standard to guide the arbitrator in his deliberations has caused some to question whether agreements to submit such matters to arbitration should be specifically enforced.[110]

As a matter of practice, however, parties do not agree to arbitrate such matters unless pressing reasons exist for finding a solution to the dispute. In the case of close corporations or partnerships the continuation of a profitable business may hang in the balance; in the case of labor management disputes the alternative may be industrial warfare. The parties themselves may, and often do prescribe detailed criteria for the arbitrator to follow in deciding such questions. At any rate, this is a problem which should properly be left to the consideration of the parties themselves. If they voluntarily agree to submit such questions to an arbitrator and to undertake the risk necessarily involved, intending to be bound, then their agreement to arbitrate should be enforced in the same manner as agreements to arbitrate any other controversy between the parties. It should be recognized, however, that in providing for the enforcement of such arbitration agreements the law is endowing the arbitrator with jurisdiction to decide matters which could not be decided by a court of law.

Under the common law with respect to arbitration no distinction was made between "justiciable" and "nonjusticiable" questions.[111] However, most earlier arbitration statutes including the 1851 California Act applied by their terms only to controversies "which might be the subject of civil action."[112] This is still the case in many jurisdictions[113] including some states such as Massachusetts[114] having "modern" arbitration acts. The present California act contains no such restriction, nor does the proposed Uniform Act.[115] The California courts themselves have imposed no such restriction; contracts to

arbitrate such questions are now enforced in this state.[116]

Labor Arbitration

Some have taken the view that arbitration agreements arising out of the labor-management relationship are unique in their basic nature and purpose and should not be specifically enforced or, if enforcement is to be provided, that special and separate statutory provisions should be enacted.

It is certainly true that in many respects the collective bargaining relationship is quite different from the usual commercial business transaction. In many commercial transactions the parties are essentially strangers. If they find they cannot strike a bargain with each other they can usually simply take their business elsewhere. If they do make their agreement they can normally transact their business in a relatively limited time and go their separate ways. If a dispute arises as to the application or performance of their agreement they may settle the matter by taking it to the courts, which are at least theoretically adapted to settle such problems and to provide adequate remedies. When they utilize arbitration it is often because under the circumstances they believe it to be quicker, cheaper or more just or because they wish their dispute to be settled according to trade customs and practices rather than formal rules of law.

In contrast to this, in the labor-management relationship the parties cannot simply go their separate ways without severe

economic repercussions. In a very real sense a collective bargaining agreement is more than an ordinary contract. For one thing it applies to all employees whether or not they are actually parties to it and whether or not they belong to the union. It forms a body of "law" setting norms of behavior governing the complex internal relationships existing within the business institution. When disputes arise concerning it the kinds of solutions needed are most often solutions which courts of law are simply not equipped to provide. "What is needed is a process of adjudication of disputes which is keyed to the institution itself. Arbitration, but not the courts satisfies that need . . . . The facts with which the arbitrator deals are facts concerning institutional life and the ends he must seek to serve are institutional ends."[117]

In approaching problems dealing with the enforcement of labor management arbitration agreements and awards it should be kept in mind that arbitration may be and is used in two different ways in connection with the collective bargaining process, serving two rather different functions. The first may be termed grievance or "rights" arbitration. As we have seen, in nearly all modern collective bargaining agreements grievance procedures are established to resolve problems which may arise as to the application of its provisions. These normally provide for discussion of claims or disputes perhaps including mediation or conciliation, and if these devices fail, arbitration.

The second function of arbitration in this context may be termed contract or "interests" arbitration. Here, arbitration is used not to determine rights under an existing contract but to determine the terms of a new or modified agreement, to change the existing legal relationship of the parties rather than merely interpret and enforce it. For example, the parties may agree upon a long term collective bargaining contract that provides for periodic re-negotiation of certain provisions, such as wage scales, and provides further that such matters will be referred to arbitration if the parties fail to agree. There seems to be a continuing growth in the use of this kind of arbitration for the settlement of contract terms pertaining to such matters as wages, vacation provisions, sick leave, holidays, social gains consisting of surgical, medical and hospitalization, pension plans and the union shop.[118]

There have been three somewhat related arguments made against the enforcement of labor management arbitration agreements and awards:

1. That labor-management arbitration is merely an extension of the completely voluntary collective bargaining process and as such should not be enforced or compelled by the courts.

With respect to grievance arbitration, it is pointed out that because of the continuous nature of the collective bargaining relationship and the great pressures which exist on the parties to come to an agreement to avoid a breakdown of negotiations over minor issues, the collective bargaining contract is deliberately cast in broad, "non-legalistic" terms, setting forth only basic principals

governing the relationship; that the "gaps" which are left open as to specific application and interpretation of these general principles are left to be filled as specific questions arise. Provision is made for discussion on such questions when they occur, perhaps including conciliation or mediation by third parties, with arbitration as the ultimate device. It is argued that arbitration, viewed in this context, should be regarded not so much as a quasi-judicial "trial" as a proceeding under which the arbitrators are appointed by the parties to act as their "agents" to spell out and complete their agreement; that court enforcement or interference with this purely voluntary collective bargaining process would be anomalous.[119] The arbitrator under this view is regarded not so much as a judge of a dispute as an adjustor of interests and a medium for arriving at compromise. In support of this view it is pointed out that frequently in labor aribtration two or more members of the arbitration board are appointed by parties as advocates, intended to represent the opposite points of view.

The difficulty with this point of view, at least as applied to grievance arbitration, is that it is simply not consistent with the fundamental nature of the arbitration process as it actually operates. As we have already seen, the arbitration process itself is necessarily a decision making process. It cannot by its very nature be a means of arriving at an actual agreement or compromise between the parties. The arbitrator is an agent only in the sense that the parties have appointed him or arranged a procedure for his

appointment. He is not in fact acting on behalf of either party. Nor is he acting on behalf of both jointly since the party's purposes and views are necessarily in opposition or he would never have been retained. He himself makes the decision; he does not merely assist the parties themselves to do so. The fact that partisan arbitrators may be appointed to a so called "tri-partite" board with the avowed purpose of representing the parties does not really alter this fact. (Indeed, the use of such arbitrators seems to be diminishing considerably.)[120] If it is to be in fact an arbitration a neutral arbitrator must also be appointed. If he is so appointed then it is he who will make the decision. Any "compromise" at which an arbitrator may arrive is his own compromise, not that of the parties and represents a compromise between points of view and not between the parties themselves.

In grievance arbitration the arbitrator fills in the "gaps" in the law it administers only in the same limited way that a court of law fills in the "gaps" in the law it administers. It is true that the questions submitted to arbitration may differ considerably from those which a court of law ordinarily faces and the awards rendered may be of a kind which courts are not really adapted to give. As a matter of actual practice, however, such arbitration proceedings are normally conducted in a clearly quasi-judicial manner. In fact, to the disappointment of some, they appear to be becoming increasingly formal and legalistic in their nature. Counsel appear representing one or both parties in perhaps a majority of the cases; transcripts of the proceedings are very commonly taken; briefs are filed after

the close of the hearings in a substantial portion of the cases; there is a growing tendency of arbitrators to accompany their awards with written opinions; such opinions are frequently published.[121] Thus it is reasonably clear that grievance arbitration [both in theory and] in practice does not operate as a mere extension of collective bargaining; it presents no fundamental distinction from other kinds of quasi-judicial arbitration.

With respect to contract or "interests" arbitration the question is not quite so simple. When the arbitrator determines the provisions of the agreement itself he is performing a quasi-legislative rather than a quasi-judicial function. Even if we grant the validity of this distinction however, it does not necessarily follow that agreements to arbitrate such questions should not be enforced. Arbitration even in this context is still essentially a decision making device. The contract terms prescribed by the arbitrator do not represent any actual agreement arrived at by the parties themselves any more than does the decision of an arbitrator in a grievance case. It is not and cannot be a mere continuation of the bargaining process; on the contrary it is a substitute for negotiation and agreement under circumstances where the process has failed or broken down.

The questions involved in this kind of arbitration are of course nonjusticiable in nature and as with other nonjusticiable questions the arbitrator may be presented with a problem for solution without the aid of clearly established standards or criteria. We have already suggested however that this is a problem which can and

should be handled by the parties themselves in their arbitration agreement and in their choice of an arbitrator.

Opposition to the enforcement of contract arbitration sometimes arises from a fear of "compulsory arbitration."[122] Under compulsory arbitration the parties are forced by the state to arbitrate questions as to the terms of the collective bargaining contract. The specific enforcement of the kind of arbitration agreements we are here discussing results in somewhat the same thing: the parties are forced by law to submit the terms of their contract to the decision of third parties. Thus the parties are deprived of the "ultimate sanctions of collective bargaining -- recourse to self-help. The contract is imposed from above, rather than purposed from below."[123] There is however a vital distinction between the kind of contract arbitration we have been discussing and true "compulsory arbitration." "In the former the parties have voluntarily agreed to arbitrate the provisions of a new contract. They have voluntarily forsworn their privileges of self-help; they have defined the jurisdiction of the arbitrator; they have provided a means for submitting the dispute to him; and they have determined at what point -- probably only after complex conciliation and mediation procedures have been followed -- the dispute will be submitted and, most important, they have provided for the selection of their own arbitrator. Thus, if compulsory arbitration be a spectre in this situation, it is indeed an elusive one."[124]

On the contrary, there are valid arguments for judicial enforcement of this kind of arbitration agreement. The issues

involved are nonjusticiable; if the parties fail to agree on the terms of their contract they cannot resort to legal action; the choice here even more clearly than in the grievance situation is between arbitration and economic warfare.

It may be that a mature collective bargaining relationship would lead the parties to resist abdicating their bargaining function to the decision of an arbitrator and that more satisfactory results in the long run would be achieved by actual negotiation and agreement by the parties themselves.[125] But if they choose to agree to refer such a matter to arbitration to avoid industrial strife (and possibly to "save face") there seems to be no valid reason why such an agreement should not be enforced.

2. The position has been taken by some that labor arbitration agreements and awards should not be enforced on the ground that it is simply unnecessary because the threat of economic warfare exerts sufficient coercive pressure on the parties to cause them to voluntarily abide by their agreement.[126] It may be questioned however whether it is desirable that a strike, lockout or other form of economic pressure should be the only weapons available for enforcing agreements which the parties have voluntarily entered into, intending to be bound. It seems doubtful that enforcement of such agreements, especially where there is some question as to what disputes the parties have agreed to arbitrate, should depend on the relative bargaining position or economic strength of the parties.

Proponents of this view contend that there are very few cases where parties to labor arbitration agreements have resorted to the courts and that this indicates the lack of need for any such enforcement. This statement is difficult to support. The fact is of course that relatively few cases reach the courts involving any kind of arbitration; one of the main objects of the process is to avoid litigation. In California however the number of such cases reaching the appelate courts seems to have been increasing in recent years, such actions having been brought about equally often by unions and by management. In states not enforcing such arbitration agreements the need for such enforcement is suggested by the considerable volume of recent cases from nearly all jurisdictions in which attorneys (particular union attorneys) have attempted to employ Section 301 of the Taft-Hartley Act as a legal sanction in arbitration enforcement.[127]

3. The fear of excessive judicial interference appears to lie at the bottom of some opposition to the enforcement of labor arbitration agreements.[128] This fear is not entirely groundless. Before a court may enforce arbitration agreement or award it must, of course, determine if a dispute in fact exists and if the parties have in fact agreed to arbitrate such disputes i.e., whether the controversy is "arbitrable." There have been decisions in jurisdictions where such arbitration agreements are now enforced in which the courts in deciding "arbitrability" appear to have in fact decided the case on its merits. An example of this is a much critized New York decision in International Association of Machinists v.

Cutler-Hammer.[129] In this case the agreement between the employer and the union provided that disputes as to the "meaning, performance, non-performance or application" of its terms were to be submitted to arbitration. The agreement also contained a provision that the employer and the union were to meet in a given month to discuss payment of a bonus for the first six months of 1946." The employer took the position that he was required only "to discuss" whether or not a bonus should be paid; the union contended that the agreement meant that a bonus must be paid and that the only subject open for discussion was the amount of the bonus. This appears quite clearly to give rise to a controversy as to the "meaning" of the terms of the contract; as such it appeared to be within the scope of the arbitration clause. The court, however, refused to order the submission of the matter to arbitration holding:

> All the bonus provision meant was that the parties would discuss the payment of the bonus. It did not mean that they had to agree on a bonus or that failing to agree an arbitrator would agree for them. Nor did it mean that a bonus must be paid and only the amount was open for discussion. So clear is this and so untenable any other interpretation that we are obliged to hold that there is no dispute as to the meaning of the bonus provision, and that no contract to arbitrate the issue tendered.[130]

The general trend of decisions, however, (as we shall see at a later point in this study) seems to be leading away from this

sort of judicial "interference."[131] Presumably a statute could be properly drafted as to prescribe the extent of judicial interference with considerable clarity; this should not prove to be an insurmountable obstacle to the enforcement of labor arbitration agreements. Perhaps some court "interference" is merely the price which must be paid for an otherwise desirable end.[132]

If we conclude that labor arbitration agreements should be enforced the question remains whether special and separate legislation is needed to cover this area. It is difficult to support the need for any such special legislation. In the first place the collective bargaining relationship is fundamentally not so unique as may at first appear. It is not the only relationship which is in any way continuous in nature nor is it the only one with regard to which there is great pressure on the parties to agree. Nor, indeed, is it the only situation in which contracts are drawn in broad terms leaving details to be spelled out as questions arise. The fact that continuous or recurrent economic contacts exist between the parties to many commerical business relationships has been one of the fundamental reasons why such parties have undertaken to submit questions arising out of their relationship to arbitration. The growth in the use of arbitration among members of trade organizations, commodity exchanges and industry groups has already been mentioned. An examination of the characteristics of arbitration in the labor management relationship leads to the conclusion that the same general statutory provisions are desirable here as with other types of arbitration. It might be noted that the commissioners on uniform state laws came to the same conclusion.[133]

The Present California Statute

Section 1280 of the California Code of Civil Procedure, which provides that arbitration agreements are valid, enforceable and irrevocable, contains the following clause added at the end of the section: "provided, however, that provisions of this title shall not apply to contracts pertaining to labor." This proviso did not appear in the original draft of the statute but was apparently added in the judiciary committee.[134] Nothing in the legislative history indicates why it was added nor is there anything to indicate what it was intended to mean.

The provision was first construed in 1935 in Universal Pictures Corp. v. Superior Court.[135] That case involved not a collective bargaining agreement, but an employment contract with an actor under which he was to receive compensation of $1000 per week. The court held that an arbitration provision in the contract could be enforced; that it was not a "contract pertaining to labor" within the meaning of the statute. The court stated that "since no rule of the construction of the statute in which it is applied demands that the word 'labor' as used therein be accepted and read otherwise than it is commonly understood, its general meaning should be restricted. In its present connection, the meaning that should be attributed to the word is that it applies to that kind of human energy wherein physical force, or brawn and muscle, however skillfully employed, constitute the principle effort to produce a given result, rather than where the result to be accomplished depends primarily upon the exercise of the mental faculty."[136]

The following year in Kerr v. Nelson[137] the California Supreme Court held that an arbitration provision in an employment contract wherein Kerr was to act as sales manager or general manager of a corporation could be enforced under the statute; that it also was not a "contract pertaining to labor." The court adopted the general definition of "labor" adopted by the circuit court of appeal in the Universal Pictures case, that individuals whose principal efforts are directed to the accomplishment of some mental task are not to be classed as "laborers" within the meaning of the statute. In 1950 the court reached a similar result in Robinson v. Superior Court[138] which involved an employment contract between an "artist" and an employment agency.

In 1940, in Levy v. Superior Court,[139] the California Supreme Court was directly faced with the question of whether or not this provision in the arbitration statute applied to collective bargaining agreements. The court held it did not. The court cited the previous cases limiting the application of the provision to "brawn and muscle" labor and went on to say that considerations bearing on the intent of the legislature in excluding agreements pertaining to labor "lead to the conclusion that the legislature had in mind contracts pertaining to actual hiring of labor between employer and laborer." The court appears to have reached this conclusion by referring to Labor Code Section 200(b) as indicating the general meaning which the legislature intends to give to the term "labor." That section defines labor as including "labor, work or service whether rendered or performed under contract, sub-contract, partnership, station plan, or other agreements

if the labor to be paid for is performed personally by the person demanding payment." The court concluded therefore that "a contract pertaining to labor means a promise to perform labor and a promise therefore to pay a stipulated price. The elements involved in that definition are absent from a collective bargaining agreement, which is distinct and separate from a contract of hiring . . . ."[140]

Whatever the merits of its reasoning, the Levy case has been followed without discussion in several subsequent decisions.[141]

Thus the present proviso in the California Statute with respect to "contracts pertaining to labor" appears to have been construed to mean only that arbitration agreements in contracts of employment with workers performing services principally consisting of the use of "brawn and muscle" are not subject to the statute and are thus not to be enforced.

There is, however, at least one theoretical difficulty which the Levy case leaves unanswered. The argument can be made that although a collective bargaining contract in its inception is separate from contracts of employment it may be incorporated into a separate contract of hiring of the employee. "It is in the nature of a general offer, and an individual who accepts employment or continues employment after it becomes effective does so on the terms and conditions fixed by it."[142] Thus a court could conceivably choose to hear a dispute with an individual employee on the merits with respect to wages or working conditions, or to require arbitration, depending on whether the court takes the view that the suit is based on the individual employment contract or the collective bargaining agreement. There appear to be no decisions on this matter. However, the kind of logical difficulty

involved may be illustrated by the somewhat analogous problem arising in Division of Labor Law Enforcement v. Dennis,[143] This case involved the statute of limitations. The time for suit based on an oral contract had expired; the time for suit based on a written agreement had not. The respondent contended that as stated in the Levy case the collective bargaining agreement and an individual contract of hiring are separate and distinct contracts; that a collective bargaining agreement is incomplete of itself, furnishing no basis for a right of action to an individual employee; that a cause of ction to recover wages set by the collective bargaining agreement necessarily was based on the separate agreement of employment, which in this case was oral. The court held, however, that suit was not barred by the statute, taking the position that the employee might sue on the collective bargaining agreement as a third party beneficiary, being a member of the class intended to be benefited.

In any event, the construction given to the "labor" provision in the California statute appears largely to negate any important effect it might have. Presumably its only purpose, as now construed, is to protect individual employees from being forced into unfavorable arbitration agreements because of their relatively weak bargaining position. As a practical matter it may be questioned how often, if ever, an employment contract with "brawn and muscle" employees contains an agreement to arbitrate disputes, or, indeed, how often there is any formal written contract of employment at all in such circumstances.

The current law with respect to this provision is unsatisfactory. The most obvious way to clarify the matter is simply

to eliminate the language of Code of Civil Procedure Section 1280 with respect to "contracts pertaining to labor." In some jurisdictions which enforce labor arbitration agreements the statutes expressly state that such agreements are to be included thereunder.[144] The Uniform Act provides: "This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement.]"[145] In view of the construction given by the courts to the present California Statute there appears to be no need for inserting any such express provision that labor-management arbitration agreements are covered. Nor does the optional proviso in the proposed Uniform Act seem to be necessary; presumably the parties could draft their agreement in such a way as not to be bound whether or not such a provision is present.

It should be noted that the New York courts have resisted the enforcement of contract arbitration agreements. In Matter of Buffalo and Erie R. Co.,[146] the New York court refused to enforce an agreement to arbitrate a wage provision in a yearly collective agreement which was up for renewal on the ground that it was "non-justiciable" and that the court had no power to "make contracts for people." The New York Legislature then amended the law to add a provision reading: "A provision in a written agreement between a labor organization, . . . and an employer or employers . . . to settle by arbitration a controversy or controversies thereafter arising between the parties to the agreement including but not restricted to controversies dealing with rates of pay, wages, hours

of employment or other terms or conditions of employment . . . shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any agreement."[147] As a result of that amendment New York enforces the arbitration of non-justiciable labor management disputes. There are decisions subsequent to that amendment however in which the courts have still refused to decree the arbitration of disputes arising over the terms of an entirely new agreement.[148]

The California courts have enforced arbitration agreements and awards under collective bargaining contracts providing for subsequent re-negotiation and arbitration of wage schedules[149] and similar matters.[150] Nothing in the decisions indicates that they would refuse to enforce an agreement to arbitrate the terms of an entirely new contract. It should be noted, however, that Code of Civil Procedure Section 1280 appears to limit the enforcement of agreements to arbitrate future disputes to controversies "thereafter arising out of the contract or the refusal to perform the whole or any part thereof." Conceivably, it could be argued that the arbitration of the terms of an entirely new contract could not constitute a controversy arising out of the contract containing the arbitration provision. For this reason, and in the interest of simplicity, language similar to that used in Section 1 of the proposed Uniform Arbitration Act might be preferable. This reads:

> Section 1. A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any

controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law in equity for the revocation of any contract.

FOOTNOTES

99. Cal. Code Civ. Proc. § 1280 is limited to "A provision in a written contract to settle by arbitration . . .."; § 1281 provides that "Two or more persons may submit in writing to arbitration any controversy . . . ." The New York statute is explicit on this, providing:

> "A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith, or his lawful agent." N.Y. Civ. Pract. Act, § 1448.

100. Uniform Arbitration Act, § 1.

101. Pirsig, Some Comments on Arbitration Legislation and The Uniform Act, 10 Vand. L. Rev. 685, 691 (1957).

102. Sturges, Commercial Arbitrations and Awards 2-6 (1930). The New York Act expressly provides that common law arbitrations shall remain valid: N. Y. Civ. Pract. Act. § 1469.

103. Crofoot v. Blair Holdings Corp., 119 Cal. App.2d 156, 181, 260 P.2d 156, 169 (1953). Prior to the 1927 statute the California courts recognized common law arbitration as an alternative procedure: Christenson v. Cudahy Packing Co., 198 Cal. 685, 247 Pac. 207 (1926); Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817 (1912); Meloy v. Imperial Land Co., 163 Cal. 99, 124 Pac. 712 (1912).

104. Cockrill v. Murphis, 68 Cal. App.2d 184, 156 P.2d 265 (1945).

105. Sturges, Commercial Arbitrations and Awards, 198, 210 (1930).

106. 25 F.2d 930 (9th Circ. 1928).

107. Id. at 932; see also Comment, 17 Calif. L. Rev. 643, 650 (1929).

108. See O'Neal, Arbitration in Close Corporations: A study in Legislative Needs, 12 Arb. J. (N.S.) 191 (1957); O"Neal, Resolving Disputes in Closely Held Corporations: Intra-Institutional Arbitration, 67 Harv. L. Rev. 786 (1954).

109. Gregory, Labor and the Law (1946).

110. Gregory & Orlikoff, The Enforcement of Labor Arbitration Agreements, 17 U. Chi. L. Rev. 233, 250 (1950).

111. Sturges, Commercial Arbitrations and Awards, 198 (1930).

112. Calif. Stats. 1851, c. 5 p. 111 § 380.

113. For example: Ark. Stats., 1947 § 34-501; Ida. Code, 1948 § 7-901; Ind. Annot. Stats., 1933 (Burns, 1946) § 3-201; Iowa Code Annot. (1950) ch. 679 § 679.1; Mich. Comp. Laws, 1948, Judicature Act § 645.1; N.Y. Civil Prac. Act § 1448 (Limitation does not apply to collective bargaining in N. Y.).

114. Mass. Gen. Laws, 1932 ch. 251 § 1.

115. Indeed, Section 12(5) of the Uniform Act expressly states: "but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." The recent Florida Act expressly applies "without regard to the justiciable character of the controversy." Fla. Stats. 1957, § 57.10.

116. See, for example: Alpha Beta Food Markets v. Retail Clerks, 45

Cal. 2d 764, 291 P.2d 433 (1955); L. A. Local Joint Exec. Board of Culinary Workers & Bartenders, A. F. of L. v. Stan's Drive-Ins, Inc. 136 Cal. App.2d 89, 288 P.2d 286 (1955); Stenzor v. Leon, 130 Cal. App.2d 729, 279 P.2d 802 (1955); McKay v. Coca Cola Bottling Co., 110 Cal. App.2d 672, 243 P.2d 35 (1952).

117. Carlston, Theory of The Arbitration Process, 17 Law & Contemp. Probs. 631, 640, 641.

118. See Editor's Note, 7 Arb. J. (n.s.) 9 (1952).

119. Frey, The Proposed Uniform Arbitration Act Should not be Adopted, 10 Vand. L. Rev. 709 (1957).

120. In a recent study of 1,183 labor arbitration cases handled by the American Arbitration Association throughout the country, it was found that 82% of awards rendered were decided by single, impartial arbitrators: Procedural & Substantive Aspects of Labor-Management Arbitration, 12 Arb. J. (n.s.) 67, 69 (1957); see also Reynard, Drafting of Grievance & Arbitration Articles in Collective Bargaining Agreements, 10 Vand. L. Rev. 749 (1957).

121. In the study by the American Arbitration Association, supra note 120, it was found that in 1,183 cases handled through the A.A.A., transcripts were taken in 22.7% of the cases; briefs were filed after the close of hearings in 41.9%; one or both parties were represented by counsel in 63.7%; see also Katz & Mitkhell, Challengeable Trends in Labor Arbitration, 7 Arb. J. (n.s.) 12 (1952).

122. See Gregory & Orlikoff, supra note 110; Phillips, The Function of Arbitration In The Settlement of Industrial Disputes, 33 Colum. L. Rev. 1366 (1933).

123. Gregory & Orlikoff, supra Note 110 at 250.

124. Ibid.

125. Note, for example, the comments of Elmer E. Walker, General Vice President, International Association of Machinists as quoted in 7 Arb. J. (n.s.) 88 (1952):

"At the very outset I wish to make clear that I do not believe there is an effective substitute for collective bargaining in the determination of wages, hours, and working conditions . . . . As substitutes for collective bargaining, fact-finding and arbitration indicate that genuine collective bargaining has not been tried or that it has been deliberately avoided . . . . Poor collective bargaining, stubbornness, or the necessity to save face by shifting responsibilities to others are the dominant reasons why arbitration is substituted for collective bargaining. If the parties are genuinely interested in justice, then no person is better qualified to deal with the unresolved issues more justly than the parties themselves."

See also Handsaker, The Arbitration of Contract Terms, 7 Arb. J. (n.s.) 2 (1952).

126. See Howard, Labor-Management Arbitration "There Ought to Be a Law" -Or Ought there?, 21 Mo. L. Rev. 1 (1956).

127. Isaacson, A Partial Defense of the Uniform Arbitration Act, 7 Lab. L. J. 329, 330 (1956).

128. See, for example, Mayer, Judicial "Bulls" in The Delicate China Shop of Labor Arbitration, 2 Lab. L. J. 502 (1951); Report of Committee on Arbitration of the National Academy of Arbitrators,

16 Lab. Arb. 994, 998 (1951); Summers, Judicial Review of Labor Arbitration or Alice Through The Looking Glass, 2 Buff. L. Rev. 1, 10, 11 (1952); Cox, Legal Aspects of Labor Arbitration in New England, 8 Arb. J. (n.s.) 5 (1953); Mayer, Arbitration and the Judicial Sword of Damocles, 4 Lab. L. J. 723 (1953).

129. 271 App. Div. 917, 67 N.Y.S.2d 317 (1st Dept.), aff'd per curiam, 297 N.Y. 519, 74 N.E.2d 464 (1947).

130. 67 N.Y.S.2d at 318.

131. See Kharas and Koretz, Judicial Determination of the Arbitrable Issue, 11 Arb. J. (n.s.) 135 (1956).

132. Isaacson, supra note 126 at 333.

133. Pirsig, supra note 101 at 692.

134. See Note, 29 Calif. L. Rev. 411, 412 (1941).

135. 9 Cal. App.2d 490, 50 P.2d 500 (1935).

136. Id. at 494, 50 P.2d at 502.

137. 7 Cal.2d 85, 59 P.2d 821 (1936).

138. 35 Cal.2d 379, 217 P.2d 10 (1950).

139. 15 Cal.2d 692, 104 P.2d 770 (1940); see Notes 29 Calif. L. Rev. 411 (1941); 14 So. Calif. L. Rev. 64 (1940); 54 Harv. L. Rev. 500 (1941).

140. Id. at 694, 104 P.2d at 771.

141. Black v. Cutter Laboratories, 43 Cal.2d 788, 278 P.2d 905 (1956); L. A. Local Joint Exec. Bd. of Culinary Workers, A.F.L. v. Stan's Drive-Ins, Inc., 136 Cal. App.2d 89, 288 P.2d 286 (1955); Stenzor v. Leon, 130 Cal. App.2d 729, 279 P.2d 802 (1955); Flores v. Barman, 130 Cal. App.2d 282, 279 P.2d 81 (1955); McKay v. Coca Cola

Bottling Co., 110 Cal. App.2d 667, 220 P.2d 973 (1950).

142. 32 Cal. Jur. 2d 416.

143. 81 Cal. App.2d 306, 183 P.2d 932 (1947).

144. See, for example New York Civil Practice Act, § 1448.

145. Uniform Arbitration Act, § 1. The bracketed phrase is apparently intended as an intermediate position between states such as New York which expressly include collective bargaining agreements and those states which exclude them; see National Conference of Commissioners on Uniform State Laws, Proceedings in Committee of The Whole, Aug. 9-14, 1954, p. 15 H.

146. 250 N. Y. 275, 165 N.E. 291 (1928).

147. New York Civ. Prac. Act § 1448.

148. Marseillaise French Baking Co. v. O'Rourke, 121 N.Y.L.J. 1270 (1948); cf. Kallus v. Idea Novelty & Toy Co. 292 N.Y. 459, 55 N.E.2d 737 (1944); Ford Instrument Co. v. Dillon, 77 N.Y.S.2d 72 (1947).

149. L.A. Local Joint Exec. Board of Culinary Workers & Bartenders, A.F. of L. v. Stan's Drive-Ins, Inc. 136 Cal. App.2d 89, 288 P.2d 286 (1955); McKay v. Coca Cola Bottling Co. 110 Cal. App.2d 672, 243 P.2d 35 (1952).

150. Alpha Beta Food Markets v. Retail Clerks, 45 Cal.2d 764, 291 P.2d 433 (1955).