Date of Meeting: September 24-26, 1959
Date of Memo: September 18, 1959

Memorandum No. 3

Subject: Study No. 32 - Arbitration

The attached material presents a number of questions concerning the scope of an arbitration statute. These questions may be decided by the Commission at this time. At subsequent meetings additional questions of this nature will be presented for decision. Using this method, the Commission can carry forward this study even though we will not receive for some time the research report of our consultant.

At the August meeting, the Commission requested the Staff to reconsider the method of procedure to be used in completing this study. The Commission has previously decided that it will make a comprehensive study of the subject of arbitration, studying each problem in the field and determining what, if any, statutory provision should be provided to deal with that problem. This approach was reflected in a tentative outline and two studies were prepared by Mr. Stephens covering the first portion of the outline. In the attached materials, using this approach, your Assistant Executive Secretary has pin-pointed several specific problems for your consideration and decision. The Staff recommends that the Commission continue to follow this approach. If this approach is followed, the Commission can anticipate receiving material of this type for each area of the field of arbitration. Briefly stated, the approach will provide a statement of the problem; the Uniform

Arbitration Act provision, if any, covering the problem; the existing California law on the problem (whether statutory or common law); and pertinent statutory and case law from other jurisdictions when of value in considering the problem. The views of authorities in the field will be presented for consideration also. The advantage of this approach is that we are sure that we will cover every aspect of the field of arbitration. If, after we have completed our study of the various problems, we find that we have generally followed the Uniform Act, we can modify the Uniform Act and adopt that. If, however, we find that we have generally followed the existing California law, we may want to modify the existing California law. Or we may find an entirely new Act is indicated if we find little we approve in the existing California law or the Uniform Act.

Another approach the Commission can take is to use the Uniform Arbitration Act as a frame of reference. Under this approach, each section of the Uniform Act would be considered and analyzed in the light of existing California law, the laws of other states and the common law. In addition, the views and arguments of experts in the field would be considered and analyzed. This is the approach we are taking on the Uniform Rules of Evidence. This approach tends to restrict us to the provisions of the Uniform Act and if we use it we may fail to consider all aspects of the field of arbitration. The probable result which would flow from this approach is a modified Uniform Act.

Another possible approach which could be used would be to use the California arbitration statutes as the frame of reference. This approach would be similar to that set forth in the previous paragraph.

The principal difference would lie in the fact that the probable result would be a modified version of the California arbitration statutes rather than a modified Uniform Act. Again, this approach would tend to restrict us to the provisions of the California law and might cause us to overlook important problems in the field.

Naturally, however, whatever approach is used, we would expect to amplify the chosen frame of reference if it should appear that there are gaps in it. A decision should be made upon this question before further consideration is given to the arbitration study, for this decision will determine the direction of the study.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

(#32) September 17, 1959

Memorandum re Arbitration

J. B. Harvey

You have previously received four studies concerning arbitration:

1. Kagel, Comparison and Analysis of the Uniform Arbitration Act and California Arbitration Statute, November, 1956 (hereinafter referred to as Comparison and Analysis).

2. Kagel, A Study of a Proposed Act to Amend the California Arbitration Statute, October, 1958 (hereinafter referred to as Study).

3. Stephens, Arbitration, April 1959.

4. Stephens, Matters Subject to Arbitration, July, 1959 (hereinafter referred to as Arbitration II).

In Stephens, Arbitration II, several questions are set forth upon which the Commission may make policy decisions before the remaining work on arbitration is completed. Three of these questions are presented here for determination:

1. Should oral contracts be included within the Arbitration Statute.

   a. If not, should oral arbitration contracts be left to common law procedures entirely.

   b. If not, should oral arbitration contracts be made void.

2. Should questions of law be subject to arbitration.

3. Should labor contracts be subject to arbitration.

The remaining question presented by the study of July 1959 concerns nonjudiciable disputes and will be presented at a later meeting

in connection with the problem of valuations.

Oral Contracts

The problem of oral arbitration agreements is discussed at pages 2 to 4 of Stephens, Arbitration II, at pages 10 to 13 of Kagel, Comparison and Analysis, and at pages 4 to 6 of Kagel, Study.

Oral contracts are ~~now~~ not covered by the existing arbitration statute in California. Code of Civil Procedure Section 1280 provides:

> A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract . . . or an agreement in writing to submit an existing controversy to arbitration . . . shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity of the revocation of any contract; . . . .

The California cases have indicated that this statute does not embrace the entire field of arbitration. In Crofoot v. Blair Holdings Corporation,[1] it was said: "Under the law as it presently exists there is no field for a common law arbitration to operate where the agreement to arbitrate is in writing." Similar language appears in Downer Corporation v. Union Paving Co.[2] These cases indicate that common law arbitration still exists in California if the arbitration agreement is oral. Under the cited cases it is clear that the statutes completely occupy the field of arbitration if the arbitration agreement is in writing.

In Cockrill v. Murphis,[3] an arbitration award based upon an oral submission agreement was enforced. The court pointed out that the arbitration was not a statutory arbitration as the California statute applies only to written contracts. Hence, under the cases it appears that California presently recognizes common law arbitration under oral

arbitration agreements.

The proposed Uniform Act will not change this situation. Section 1 of the Uniform Act provides:

> 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 or in equity for the revocation of any contract.

The chairman of the committee that prepared the Uniform Act has commented: "The act does not extend to oral arbitration agreements as to which the common law principles will continue to apply."[4]

As pointed out in Kagel, Study[5] the view is almost uniformly held that parties may arbitrate under common law rules notwithstanding the existence of an arbitration statute. Common law rules include arbitration pursuant to oral agreements. Only one state, New York, has specifically provided that an agreement to arbitrate a controversy must be in writing. Section 1449 of the New York Civil Practice Act provides:

> 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 by his lawful agent.

In some other jurisdictions the right to arbitrate pursuant to oral agreement is specifically preserved by statute.[6] In other jurisdictions where the question has arisen it has usually been held that the arbitration statutes apply only to written arbitration agreements and that common law principles apply to oral arbitration agreements.[7]

Even in states recognizing oral agreements to arbitrate there is the general limitation that such agreements to arbitrate are subject to the statute of frauds.[8] Hence, an oral agreement to submit a controversy to arbitration is unenforceable if the statute of frauds requires contracts relating to the same subject matter to be in writing.[9]

Unfortunately there has been little discussion of the policy considerations involved in retaining common law principles insofar as oral agreements to arbitrate are concerned. Insofar as possible the policy considerations and arguments will be set forth here.

The Uniform Law Commissioners considered it "unwise to permit an irrevocable arbitration agreement to be left to the uncertainties of claimed oral transaction."[10] Related to this consideration is the following discussion by Professor Corbin:[11] "It seems, therefore, that the vice of general and unlimited arbitration agreements lies in the fact that the parties try to bind themselves to avoid the courts and to submit to private arbitration issues that at the time they do not have clearly in mind, which after they have arisen one of them is no longer willing to submit to the private arbitrators. The friendly arbitration of a dispute if nearly always desirable. It seems otherwise where the proceeding is against the will of one of the parties, who has lost confidence in the arbitrators or in the method." Although Corbin's argument is directed toward the enforcement of all agreements to arbitrate future disputes, it is particularly relevant to an oral agreement to arbitrate future disputes because there is no record of what was agreed to by the parties. If the contract is in writing there is at least a certain amount of assurance that the parties will understand that certain

defined issues are to be decided by arbitration. If the contract is oral, the parties may not even have clearly in mind what the basic contract is.

In addition, there is always the possibility of fraud or perjury. The policy of the statute of frauds -- that some matters are too important and too easily subject to fraud to be left to oral agreement -- might well be extended to agreements to arbitrate.

If because of these considerations it should be decided that oral agreements are not to be included in the arbitration statute it must then be decided whether oral agreements to arbitrate are to be left to the common law or whether they are to be made void. This will involve further decisions to be made as a matter of policy. At page 11 of Kagel, Comparison and Analysis, the differences between common law arbitration and the California Arbitration Statute as it presently exists are set forth. There may be additional differences but the ones set forth are the principle ones. For ease of reference they are repeated here.

Common Law	California Statute
No specific performance of agreements to arbitrate existing or future disputes.	Specific performance available.
Either party may revoke an agreement before award made.	No revocation.
Award enforced by an action on the award.	Award entered as judgment.
If after filing suit, parties agree to a common law arbitration, this results in a voluntary withdrawal of suit from jurisdiction of the court.	Agreement to arbitrate only stays suit.

Common Law	California Statute
Despite a referral of a matter to arbitration, a party may bring an action.	Such an action can be stayed.
If the parties cannot select an arbitrator the agreement to arbitrate is a nullity.	Court shall appoint the arbitrator.
No power in arbitrator or courts to issue subpoenas or arrange for deposition.	Such power is given arbitrator.
No remedy to correct errors in award.	Statute provides for method of correcting award or modifying it.

The argument of the Uniform Law Commissioners that it is unwise to permit an irrevocable arbitration agreement to be left to the uncertainties of a claimed oral transaction is related only to the first two matters listed. It does not explain why oral agreements should be left to common law procedures so far as the remaining factors are concerned. If a matter has been submitted to arbitration, even though orally, no arguments have been advanced as to why a pending suit should be dismissed rather than stayed pending the arbitration. Again, no argument has been advanced as to why an award made upon an oral submission should not be entered as a judgment as an award made upon a written submission is. No reasons have been advanced as to why a person should have a right to bring an action while arbitration is pending. The court is as capable of appointing an arbitrator when the parties cannot agree whether the arbitration agreement is oral or in writing. There appears to be no reason why an arbitrator appointed by written agreement should have the right to subpoena while an arbitrator appointed by oral agreement should not. Similarly, there appears to be no reason for permitting minor corrections

of an arbitration award made upon a written submission and denying such remedy to awards made pursuant to oral agreements.

Hence, if oral agreements are not to be specifically enforced under the statute, the Commission should make the following additional determinations:

1. If oral agreements are not to be specifically enforced, should an award based on such an agreement be enforced?

2. Should pending arbitration proceedings under oral agreements be accorded the same recognition by the courts as arbitration proceedings under written contracts, i.e., should the statutory procedures applicable to written arbitration agreements be made applicable to oral agreements with the exceptions of specific enforcement?

New York has met the problems mentioned above by requiring that all agreements to arbitrate be written.[12] Contracts to arbitrate which are not in writing are void. No other state has seen fit to go this far. The Uniform Law Commissioners have not so recommended.[13] Our consultant has recommended that oral agreements be enforced.[14]

The arguments in favor of enforcing oral agreements would seem to be the following: It is the general policy of the law to permit parties to contract in regard to important matters by oral agreement.. The argument of the Uniform Law Commissioners is relevant to any important contract which is made orally. The policy expressed in that argument is also expressed in the statute of frauds. The statute of frauds is applicable to arbitration agreements because they are contracts.[15] It does not seem that arbitration agreements are necessarily more complex than many other contracts which are enforced even though entered into orally.

To be consistent with existing public policy as established by the Legislature, arbitration agreements should be required to be executed with the same formalities that would be required of any contract relating to the same subject matter. Agreements to arbitrate should not be singled out for special classification. They should be treated as are any other contracts under the statute of frauds. No other jurisdiction than New York has made the policy decision to require that all arbitration agreements be written. The Uniform Law Commissioners have not so recommended and neither does our consultant.

A result of the New York policy may be seen in the recent case of Acadia Co. v. Edlitz.[16] There, an employee was originally employed under a written contract of employment with an arbitration provision. The contract expired, but the employer and employee orally agreed to an extension of the employment. A dispute arose and a municipal court action filed. In accordance with the New York arbitration statute a motion was made to stay the court action until the matter could be arbitrated. The court held that there was no written arbitration contract as the contract had expired. Therefore, no stay could be granted. Even though the terms of the arbitration provision were clear, and there was no possibility of fraud or perjury in determining the nature of the arbitration agreement, the court refused to enforce the agreement because of the statutory provision requiring a writing. The case would be even stronger had the parties completed the arbitration process. If the matter had been arbitrated and a written award had been made by the arbitrator, still the court would have had to declare that the award was invalid because the statute declares that arbitration agreements are void

unless they are in writing.

From the number of appellate cases which appear in the reports involving oral agreements to arbitrate it must be concluded that the problem arises quite infrequently. Usually oral arbitration agreements involve simple issues such as the value of a crop which has been destroyed,[17] or the value of the occupancy of land over a period of time,[18] or the location of an uncertain boundary.[19] Thus, the scope of the issues subject to arbitration are not usually difficult to establish. So far as the possibility of fraud is concerned, it seems unlikely that a person would resort to fraud to force someone to go to an arbitration proceeding, because a court can insure the impartiality of the arbitration proceeding through the selection of an impartial arbitrator if the parties cannot agree upon the arbitrator. If fraud were to be committed it hardly seems likely that it would be to establish a nonexistent agreement to arbitrate. If all oral arbitration agreements are invalidated to protect against the possibility of fraud, many arbitration agreements, the existence and terms of which are unquestioned as in the New York case cited, will be invalidated for the lack of a written instrument. Similarly there is the possibility that a party will attack an arbitration award made after he has fully participated in the arbitration proceeding because the original agreement was not in writing. The possibility of fraud does not seem so great that a policy should be adopted that would lead to the results exhibited by the New York case.

Corbin's discussion relates to the enforceability of arbitration agreements generally. If his argument is accepted no arbitration agreements should be enforced.

Even if oral agreements are not to be specifically enforced under the statute, it seems that the awards which are made as a result of an oral agreement and the procedures for proceeding with the arbitration should be governed by the same rules applicable to arbitrations pursuant to written agreements. The common law rules in this regard have been found unsatisfactory in regard to written agreements and it does not appear to be consistent to retain such rules in regard to oral agreements.

There does not appear to be any reason for retaining these rules to govern procedures pursuant to oral arbitration agreements even if it is decided that such agreements to arbitrate should not be specifically enforced. It has been suggested that the common law rules applicable to arbitration agreements arose at a time when judges' compensation was determined by the amount of litigation coming before them,[20] although the authority for this statement has been questioned.[21] In any event, whether the rules were created as a result of an antipathy resulting from bias or not, the rules have been found unsatisfactory in regard to written agreements and have resulted in arbitration statutes in almost all of the states. Hence, even if it is determined that oral arbitration agreements should not be specifically enforced, it is difficult to see any reason for retaining unsatisfactory common law rules relating to arbitration procedures and awards made pursuant to oral arbitration agreements.

The Commission, then, must decide if oral agreements are to be abolished, to be enforced under the statute, to be partially subject to statutory procedures, or to be left to the common law.

Questions of Law

The question of whether questions of law should be submitted to arbitration is discussed at pages 4 and 5 of Stephens, Arbitration II. As indicated in the cited study at common law no distinction was made between questions of law and the fact, and both were subject to arbitration.[22]

Under California's present arbitration statute questions of law are subject to arbitration as are any other questions.[23] No cases can be found from other jurisdictions holding that questions of law should not be subject to arbitration.

The proposed Uniform Act has no limitation. It has language similar to California's existing statute providing that "any . . . controversy" is subject to arbitration.[24]

The Uniform Arbitration Act of 1924 contained a provision which has been adopted by several states providing that the arbitrator may seek legal advice from a court in certain circumstances. The Massachusetts statute is fairly typical. It provides:[25] "Any question of law may, and upon the request of all parties shall, be referred by the arbitrator or arbitrators to the court to which the report is to be made. Upon application by a party at any time before the award becomes final under section nineteen, a superior court may in its discretion instruct the arbitrator or arbitrators upon a question of substantive law."

The quoted Massachusetts statute, and the statutes of Illinois,[26] Nevada,[27] North Carolina,[28] Utah[29] and Wyoming[30] provide that the arbitrators may submit a question of law to a court on their own motion and they shall submit a question of law to a court upon the request of all of the parties. Pennsylvania[31] provides that the arbitrators shall have the

right to apply to the court for the determination of a legal question, or the parties may apply to the court with the approval of the arbitrators, thus placing the ultimate decision as to whether to seek the court's advice in the hands of the arbitrators. In Connecticut[32] the statute provides that the arbitrators may apply to a court for a decision on a question arising in the course of the hearing upon request of all of the parties to the arbitration; hence, under the Connecticut statute there is apparently no power on the part of the arbitrators to apply to the court for such a decision upon their own motion. The former Uniform Act and the statutes of Illinois, Nevada, North Carolina, Utah and Wyoming permit one party to the arbitration to compel the arbitrator to seek judicial guidance. Massachusetts and Connecticut require the concurrence of all parties to compel the arbitrators to seek such guidance, but Massachusetts permits any party to apply to the court for instructions to the arbitrator.

The provision in the former Uniform Act permitting the arbitrators to apply to the courts for a decision upon a question of law arising in the course of the arbitration has not been carried forward to the present Uniform Act. California has no provision in its act at the present time which is similar to this provision.

Of course, as pointed out in Stephens, Arbitration II;[33] "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." However it may be that the parties at times might like a particular controversy decided according to the law. In such a case it would seem that

a provision such as that which was contained in the former Uniform Act might be desirable so that the parties or the arbitrator could resort to the courts for the clarification of a legal question.

Labor Disputes

The question of whether labor disputes should be included within the scope of an arbitration statute is discussed at pages 7 through 11 of Kagel, Comparison and Analysis, pages 2 to 4 of Kagel, Study, and pages 8 through 25 of Stephens, Arbitration II. Most of the arguments for and against subjecting labor disputes to the arbitration statute have been set forth in the foregoing studies, and no attempt will be made to repeat them here.

It will be recalled, however, that California does not exclude collective bargaining agreements from its arbitration statute. If labor agreements are excluded from any statute which may be adopted by the Legislature to replace the existing arbitration statute, this will constitute a change in the public policy of the state.

So far as other jurisdictions are concerned the statutes of Arizona,[34] Louisianna,[35] Michigan,[36] Oregon,[37] Rhode Island[38] and Washington[39] specifically except labor contracts from the provisions of their arbitration statutes. In addition, New Hampshire[40] provides that labor contracts are not subject to arbitration under the statute unless the contract specifically says so. The Washington statute[41] provides that the parties to a labor contract may specify a procedure for settling disputes which shall be enforceable. Ohio[42] formerly excepted labor contracts from the provisions of its arbitration statute but amended its

act in 1955 to eliminate this exception. In addition to these specific provisions, the arbitration statutes of certain other states exclude a large amount of labor arbitration because of the fact that statutory arbitration in such states is limited to controversies which may be the subject of a legal action.[43] Although grievance arbitration under a labor contract may relate to a matter which could be the subject of a legal action, contract arbitration or arbitration concerning terms and conditions of employment obviously cannot be the subject of a legal action.

The first question for the Commission to consider is whether labor arbitration should be excluded entirely from the statute. If it is, it must then be decided if the common law is to be applicable to such agreements. If it is undesirable to leave labor arbitration to common law procedures, the Commission must then decide whether to make a special provision for the enforcement of labor arbitration agreements. A statute exemplifying this intermediate ground is that of Washington[44] which provides that the parties may provide by agreement the procedure to govern the settlement of their dispute which procedure shall be enforceable. This approach is favored by Professor Howard of the University of Missouri[45] who feels that the typical modern arbitration statute provides for too much interference by the courts with the arbitration process and therefore encourages litigation which the arbitration process attempts to avoid.

In answer to this argument it might be said that the object of all arbitration statutes is to provide an enforcement machinery so that persons will live up to their agreements to arbitrate their disputes.

If procedures set forth in the statutes are too complex this defect can be remedied by draftsmanship. The complaint would seem as applicable to commercial arbitration as it is to labor arbitration.

Remaining Questions on Scope of Statute

In future memoranda certain miscellaneous questions involved in the scope of the arbitration statute will be set forth. The statutes of many states exclude certain specific subjects from the arbitration procedure. Case law excludes certain others. Among these are appraisals and nonjudiciable disputes. Decisions upon these matters will conclude the consideration of the scope of the statute.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

Footnotes

1. 119 Cal. App.2d 156, 181 (1953).
2. Downer Corp. v. Union Paving Co., 146 Cal. App.2d 708, 711 (1956).
3. 68 Cal. App.2d 184 (1945).
4. Pirsig, Comments on Arbitration Legislation and the Uniform Act, 10 Vand. L. Rev. 685, 691-692.
5. P. 5.
6. See Ala. Code, Title 7, § 844; Ga. Code § 7-104; Miss. Code § 297; Tenn. Code § 23-519; Vernon's Texas Stat. Art. 238.
7. Miller v. Plumbers Supply Co., 122 S.W. 2d 477 (Ky. 1938); Myer v. Grey 176 N.W. 258 (Iowa 1920); see also Schoolnick v. Finman 144 Atl. 41 (Conn. 1928) holding an oral award valid as a common law award.
8. Rickman v. White, 266 S.W. 997 (Mo. 1924).
9. Ibid.
10. Pirsig, Comments on Arbitration Legislation and the Uniform Act, 10 Vand. L. Rev. 685, 692.
11. 6 Corbin on Contracts 733.
12. N.Y. Civ. Prac. Act § 1449: "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 by his lawful agent."
13. Pirsig, Comments on Arbitration Legislation and the Uniform Act, 10 Vand. L. Rev. 685, 691-692; see also the Uniform Act.
14. Kagel, Study 1.
15. Waldon v. McKinnon, 47 So. 874 (Ala. 1908).

16. 37 CCH Lab. Cas. paragraph 65609 (1959).

17. Lilly v. Tuttle, 117 Pac. 896 (Colo. 1911).

18. Cockrill v. Murphis, 68 Cal. App.2d 184 (1945).

19. Shaw v. State, 28 So. 390 (Ala. 1889).

20. Lord Campbell in Scott v. Avery, L.R. 5 H.L. 811, 10 Eng. Rep. 1121 (1856).

21. See dissenting opinion in Park Construction Co. v. Independent School District, 296 N.W. 475, 135 A.L.R. 59 (Minn. 1941).

22. Sturges, Commercial Arbitrations and Awards 210.

23. Pacific Indemnity Co. v. Insurance Co. of North America, 25 Fed.2d 930 (9th Cir. 1928).

24. Uniform Arbitration Act § 1.

25. Mass. Ann. Laws ch. 251 § 20.

26. Smith-Hurd Ill. Ann. Stat. ch. 10 § 6.

27. Nev. Rev. Stat. § 38.140.

28. N. C. Gen. Stat. § 1-556.

29. Utah Code § 78-31-13.

30. Wyo. Comp. Stat. § 3-56-13.

31. Purdon's Pa. Stat. Title 5 § 177.

32. Conn. Gen. Stat. Title 52 § 415.

33. P. 5.

34. Ariz. Rev. Stat. § 12-1509.

35. La. Rev. Stat. Title 9 § 4216.

36. Mich. Comp. Laws § 645.1.

37. Ore. Rev. Stat. § 33.210.

38. R. I. Gen. Laws § 10-3-2.

39. Wash. Rev. Code § 7.04.010.

40. N. H. Rev. Stat. § 542.1.

41. Wash. Rev. Code § 7.04.010: The provisions of this chapter shall not apply to any arbitration agreement between employers and employees or between employers and associations of employees, and as to any such agreement the parties thereto may provide for any method and procedure for the settlement of existing or future disputes and controversies, and such procedure shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.

42. Ohio Rev. Code § 2711.01.

43. For example, Me. Rev. Stat. ch. 121 § 1 and Mo. Rev. Stat. § 435.020.

44. See note 41, supra.

45. Labor-Management Arbitration: "There Ought to be a Law" -- or Ought There?, 21 Mo. L. Rev. 1.