Memo

1/12/60

Memorandum No. 2(1960)

Subject: Study No. 32 - Arbitration

Attached is another installment of the arbitration study. A number of specific policy questions are presented. These are:

1. Should specific performance upon motion of the aggrieved party be the enforcement procedure to be provided in the Arbitration Act?

2. Should jury trial be provided on the application for order to compel arbitration?

3. Should the Uniform Act's requirement that the application show (1) the agreement to arbitrate and (2) defendant's refusal be adopted?

4. What amount of notice should be given upon a motion to compel arbitration -- 5 days? 8 days? 10 days? the time provided for the hearing of any motion in the superior court? other?

5. Should the application be personally served? Or should it be served in the manner provided for service of a summons in an action?

6. Should the parties be able to contract for a different method of service?

7. Should provision be made for a proceeding to stay a pending arbitration?

8. Should provision be made for a stay of judicial proceedings pending arbitration?

9. Should the provision of the Uniform Act be adopted that a stay of judicial proceedings may be granted only if an order to compel arbitra-

tion has been obtained or applied for?

10. Should the proposed statute indicate that defenses, such as waiver or laches, may be raised upon any application for relief under the arbitration act?

11. Should the court be required to find both the agreement and the refusal to arbitrate in order to compel arbitration, or should it order arbitration if it finds the agreement only (and no defense under question 10)?

12. Should the court have discretion to delay arbitration until other questions between the parties are settled?

13. Should the statute specifically provide that the court must find that there is an arbitration agreement and "a dispute within its terms"?

14. Should the courts be permitted to deny arbitration if they find that the claim in issue lacks any merit?

15. Should a provision be included to provide for appointment of arbitrators by the court if the parties cannot agree on such appointment?

16. If provisions are included for both neutral and party arbitrators, should the court be permitted to appoint both, or only the neutral arbitrators?

17. Should the method of appointing arbitrators discussed at pages 23-24 of the study be adopted?

18. Should a provision be included permitting the court upon application of a party to order the arbitrators to act?

Respectfully submitted,

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# A STUDY TO DETERMINE WHETHER THE ARBITRATION STATUTE SHOULD BE REVISED.

(Enforcement of Arbitration Agreements)*

* This study was made at the direction of the California Law Revision Commission by the staff of the Commission.

TABLE OF CONTENTS

(JBH) (#32)

# ENFORCEMENT OF ARBITRATION AGREEMENTS*

## INTRODUCTION: POLICIES INVOLVED

When the basic policy decision has been made, that arbitration agreements should be enforced, the question of how to implement this policy presents itself.

In the past, several approaches have been used. Treating the agreement as a condition precedent to suit has been discussed in a previous installment of this study.[1] Another enforcement method is to award damages for breach of the agreement.[2] At one time it was possible to require a bond to secure compliance with an arbitration agreement.[3] Many statutes provide that such an agreement becomes irrevocable if the agreement is made a rule of court.[4] The enforcement procedure used in most recent statutory schemes provides, in effect, for specific performance upon order of the court.[5]

Before considering procedural problems in detail, some thought should be given to the objective to be achieved in providing for enforcement.

The California Supreme Court has stated:

> The purpose of the law in recognizing arbitration agreements and in providing statutory means for enforcement is to encourage persons to avoid delays by obtaining adjustment of

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* This study was made at the direction of the California Law Revision Commission by the staff of the Commission.

their differences by an agency of their own choosing.[6]

> It has also been said that 'by reason of the fact that the proceeding represents a more expeditious and less expensive means of settling controversies than the ordinary course of regular judicial proceedings, it is the policy of the law to favor arbitration.' [7]

Arbitration agreements are enforced to avoid "the formalities, the delay, the expense, and the vexation of ordinary litigation."[8]

The Supreme Court of Pennsylvania, in sustaining against constitutional attack a statute providing for compulsory arbitration of small claims (less than $500), recently pointed out the advantages of the arbitral process.[9] The court pointed out that clogged calendars mean that trials can be had only after long periods of delay. Hence, the arbitration process provides prompt relief to the parties themselves and, at the same time, speeds the judicial process by removing the arbitration cases from the courts. The parties will also save time and expense by reason of greater flexibility in fixing the exact day and hour for hearings as compared with the more cumbersome arrangements of court calendars.

In the light of the foregoing comments, it appears that any procedures devised for the enforcement of arbitration agreements should be so formulated that they can be invoked without the "formalities, the delay, the expense, and the vexation of ordinary litigation." If an expeditious and inexpensive method of enforcement is not provided, if the enforcement procedure is as cumbersome as ordinary litigation, the parties might as well be left to their common law rights. At the same time we should not lose sight of the fact that it is the parties' agreement being enforced. The enforcement procedures, therefore, should do no more nor less than force the parties to observe and abide by their agreement. The remedies should not force them to do what they

have not agreed to do, but should force them to do what they have agreed to do.

## REMEDIES PREVIOUSLY USED

### CONDITION PRECEDENT TO SUIT

The device of considering an agreement to arbitrate as a condition precedent to suit was developed by the English courts, but has achieved a limited following in the American cases.[10] This remedy has virtues in that no formalities and no delay are involved. The agreement enforces itself. A person must arbitrate or lose all rights. No court procedures are required. Unfortunately, the remedy is available only to one party to the agreement. Only a defendant may invoke the doctrine; a plaintiff cannot. A defendant is free to disregard his agreement to arbitrate and force the plaintiff to resort to suit. Hence, the remedy is not complete. It is only half as effective as it should be.

### DAMAGES

Damages have been awarded by some courts for breach of arbitration agreements.[11] Where damages have been awarded, they have usually been nominal unless the arbitral process has begun. The Court of Appeals for the Second Circuit once commented:[12]

> Covenants in contracts to arbitrate any disputes that may arise in fulfilling the obligations of the parties are common, but it is significant that there are no adjudged cases in which there has been a recovery when the breach consisted merely in the refusal to enter upon an arbitration. The explanation is doubtless to be referred to the impossibility of proving substantial damages. There have been many cases in the books where, there having been an actual submission, damages have been allowed for a subsequent revocation. In such cases the receding party has led the other into the expense

> of making a futile experiment, and the expenses incurred thereby result directly from his act, and can be definitely ascertained. But where nothing has been done in partial execution of the covenant, and the covenant does not fix anything by way of penalty or liquidated damages, the loss arising from a refusal to fulfill is usually wholly conjectural, because it is impossible to prove that the party would have profitted by the arbitration.

Apart from the difficulty in ascertaining damages, the remedy does not provide for expeditious and inexpensive enforcement of the agreement. In fact, as the damages are often nominal, the cost of enforcing the agreement will frequently exceed the damages to be recovered. Thus, the remedy of damages at best does not preserve any of the values of the arbitration process, and at worst is totally ineffective because it is impossible to measure damages.

## BONDS OR LIQUIDATED DAMAGES

Some jurisdictions have enforced arbitration bonds or liquidated damage clauses in the agreements.[13] However, at an early date, the English courts held that equity would relieve against such agreements and would direct a trial to determine actual damages.[14] Similar holdings exist in this country.[15] As the actual damages are usually nominal, the bond or liquidated damages clause is no more effective than the remedy of damages. Moreover, the remedy has the same drawbacks. A formal court proceeding is necessary to enforce it. Thus, instead of removing the matter from the courts, another question is added to those that courts must decide.

## RULE OF COURT

The former arbitration statute in California provided that submission agreements were irrevocable when they were made a rule of court.[16] But the

obvious drawback to this remedy is that its effectiveness depends upon the consent of both parties. If one party refuses to permit the agreement to be made a rule of court, the agreement is unenforceable under the ordinary common law rules.

SPECIFIC PERFORMANCE

In the absence of statute, equity courts have traditionally refused to specifically enforce arbitration agreements.[16] This policy is still reflected in section 3390, subdivision 3 of the California Civil Code. Yet, the remedy of specific performance would merely require the parties to do what they agreed to do. Even this remedy, however, would not meet the standards desired in an effective enforcement procedure. A decree of specific performance can only be obtained after a law suit; but a truly effective enforcement procedure should avoid the "formalities, the delay, the expense, and the vexation of ordinary litigation."

To meet this difficulty, New York, in 1920, adopted its arbitration law.[17] In substance, it provides for specific performance upon motion. The motion is heard in a summary manner as are other motions.[18] A trial is held only if the existence of the arbitration agreement or the refusal to comply therewith is denied.[19] Most modern arbitration laws are based upon the New York law.[20] The Uniform Act has been based, in part, on this enactment.[21] Accordingly, in the remainder of this study, primary consideration will be given to the provisions of the New York law, the Uniform Act, as well as the California law.

To make an arbitration agreement truly enforceable in an expeditious way, California, in 1927, adopted its present arbitration statute.[22] It is

patterned after the New York act, and much of its language is the same. It, too, provides for a form of specific performance.[23] The provisions are found in the Code of Civil Procedure, sections 1280 - 1293. Section 1282 provides that a party aggrieved by the failure of another person to perform an arbitration agreement may petition a superior court for an order directing that such arbitration proceed. Five days notice is required. If the existence of the agreement is not in dispute, the court "shall make an order directing the parties to proceed to arbitration." If the agreement or the existence of the default is in dispute, the court may direct a "summary" trial. What is "summary" is uncertain, for the party alleged to be in default is entitled to a jury trial.

Section 1283 provides that the court may appoint an arbitrator if one cannot be obtained by the method provided in the agreement for the selection of arbitrators. Section 1284 provides that a civil action shall be stayed by the court in which it is pending if the matter is subject to arbitration. This section also provides that the civil action shall not be so stayed if the applicant for the stay is in default in proceeding with arbitration. Section 1285 provides that applications for relief under the arbitration act shall be heard in the manner for hearing motions, except as otherwise provided.

Generally, this scheme meets the tests of an effective enforcement procedure for arbitration agreements. With certain exceptions and deficiencies that will be discussed at a later point, the procedures are expeditious. Without considering the details of the procedure, therefore, it is recommended that the basic concept of specific performance upon motion of the aggrieved party be retained as the method for enforcing arbitration agreements.

## ENFORCEMENT PROCEEDINGS

### JURY TRIAL

The principal departure from desirable principles of enforcement in the California system is the provision for jury trial. The drafters seem to have forgotten that specific performance is an equitable remedy.[24] A jury trial is not constitutionally required.[25] To insert the jury into the procedures preserves all of the formalities, the delay, the expense, and the vexation of ordinary litigation. The parties might as well try their basic law suit if they must go before the jury anyway.

The Uniform Act has abandoned jury trial. The consultant so recommends.[26] It is, therefore, recommended that the jury be omitted from California enforcement procedure.

### THE APPLICATION TO COMPEL ARBITRATION

The Uniform Act and the arbitration provisions of the New York Civil Practice Act are similar to the California law in that all three statutes provide for an application to a court of general jurisdiction for an order to compel arbitration.[26a] But, neither the California nor the New York statutes state the facts that must be shown in the application. However, both require the court to be satisfied that the making of the agreement and the refusal of the respondent to arbitrate are not in issue. If the court determines that these matters are in issue, a trial is ordered. Both statutes provide that if the court finds that the contract exists and that the respondent has refused to arbitrate, it shall order the parties to proceed with arbitration in accordance with the agreement. If the court

finds either that the agreement does not exist or that there was no default in proceeding with it, the proceeding must be dismissed.

The Uniform Act has modified these provisions somewhat. The Uniform Act provides that the application must show an agreement to arbitrate and the opposing party's refusal to comply. The Uniform Act provides that the court shall order arbitration upon application unless the existence of the agreement is denied. If the existence of agreement is denied, there is a summary trial of that issue.

In one respect, the Uniform Act is clearly superior to the California and New York acts. Neither of the latter specify what must be contained in the application. In the interest of clarity, it seems desirable to spell out exactly what must be in the application for an order directing arbitration. It is recommended, therefore, that the proposed arbitration law spell out the contents of the application in the manner contained in the Uniform Act.

NOTICE: TIME

The Uniform Act provides that all applications to the court shall be by motion and shall be heard upon the notice provided by law for the hearing of motions.[27] The California act presently requires five days notice upon the application to compel arbitration.[28] The New York statute specifies 8 days notice.[29] The California act also provides that notice of motion to vacate, modify or correct an award shall be served as provided by law for the service of motions.[30] The general section on service of motions is section 1005 of the Code of Civil Procedure. Section 1005 provides that a notice of motion must be given 5 days before the hearing if the court is located in the same county that the attorney for the party notified has his

office, otherwise, 10 days. No reason appears for the shorter notice provision applicable to the motion to compel arbitration. So that all motions relating to arbitration proceedings shall be upon the same notice, it is recommended that the provisions of the Uniform Act be adopted.

NOTICE: SERVICE

The California Act presently requires personal service of the application.[30a] The New York act[31] provides for service "in the manner provided by law for personal service of a summons, within or without the state, or substituted service of a summons, or upon satisfactory proof that the party aggrieved has been or will be unable with due diligence to make service in any of the foregoing manners, then such notice shall be served in such manner as the court or judge may direct." The Uniform Act[32] provides for service in the "manner provided by law for the service of a summons in an action." Both the New York act and the Uniform Act provide that the parties may contract for a different manner of service. California does not so provide.

Inasmuch as an application for an order to compel arbitration is in practical effect an initiating pleading in an action for specific performance,[33] it seems desirable to provide for service in the manner provided for the service of summons in an action. The Uniform Act's provisions correspond with the United States Arbitration Act in this regard.[34] To obtain uniformity in practice, it is therefore recommended that the Uniform Act provision be adopted. It is also recommended that the parties be permitted to regulate the form of notice by contract. Many arbitration contracts are made pursuant to the rules of some commercial, trade, or labor organization which have provisions regulating the manner of service. As the members of and persons

that deal with these groups are familiar with them, it seems desirable that they be permitted to use the rules they are accustomed to work under.

STAY OF ARBITRATION

Under the Uniform Act,[35] and under the New York statute,[36] application may be made to a court to stay a pending arbitration. Under the Uniform Act, the application must show that there is no agreement to arbitrate. Under the New York Act, a person who has not participated in the arbitration in any way may move to stay a pending or threatened arbitration. Under such a motion, the issues of the making of the agreement and failure to comply with it may be tried. There is no similar proceeding provided in California law.

A provision of this nature seems desirable if the statute is also to provide for arbitration even though a party refuses to participate. The Uniform Act provides that arbitration may proceed in the absence of a party if proper notice has been given.[37] Such a provision seems necessary to prevent a person from terminating arbitration proceedings merely by withdrawing from them. But, to prevent abuse, a person should have the right to prevent the arbitration proceeding from going forward if in fact he has legal cause for preventing arbitration.

STAY OF JUDICIAL PROCEEDINGS

The Uniform Act,[38] the California law,[39] the New York law[40] and the United States law[41] all provide for a stay of judicial proceedings when the action involves an issue subject to arbitration. Such a provision is common to all arbitration statutes which provide for enforceable arbitration agreements. The California statute provides that application for the

stay shall be made in the court in which the action is pending. The Uniform Act provides that the application shall be made in the court in which the action is pending if that is a court with jurisdiction to entertain a motion to compel arbitration. If the court in which the action is pending does not have such jurisdiction, the application for a stay must be made in a court having such jurisdiction. The New York act, like the California act, provides that the application for a stay is made in the court where the action is pending.

There is some value in the California provision. The parties are already before the court, and it may be cumbersome to require that another court be brought into the litigation merely because the original court is an inferior court. On the other hand, the California and New York provisions are somewhat deficient in that they contain no provisions compelling a person to arbitrate even though an action is stayed. Hence, it may be necessary for the party obtaining the stay to bring another proceeding in a court having jurisdiction to order arbitration in order to compel the arbitration to proceed. The same issues to be decided by the court in determining the right to a stay must then be decided again by the court determining the right to compel arbitration. The Uniform Act procedure eliminates this possible duplication of effort. Under the Uniform Act, a stay can only be obtained if there has been an order for arbitration or an application for one. Thus, the right to compel arbitration and the right to a stay are determined at one time by a court having jurisdiction to compel arbitration. The superior court is not dragged into the picture unnecessarily, for the parties will have to resort to such court eventually during post-award proceedings.

A combination of the procedures specified in the Uniform Act and the California statute might be desirable. It might be provided that the application for a stay shall be determined by the court in which the action is pending. However, the stay may be granted only if an order compelling arbitration has been obtained from a court of competent jurisdiction or an application for such an order has been made. Under this procedure the court in which the action is pending, if it did not have jurisdiction to order arbitration, would not be called upon to determine the question of the right of the applicant to arbitration. That question would be left to a court with the power to order arbitration.

DEFENSES

The Uniform Act,[42] the New York act,[43] and the present California act[44] all provide that arbitration shall be ordered upon the requisite showing. Under the Uniform Act, the applicant must show the agreement and the opposing party's refusal to arbitrate. The court must order arbitration on application unless the existence of the agreement to arbitrate is denied. If a denial is made, the court summarily tries that issue, and if it finds for the moving party, the court "shall order" arbitration. Under the California and New York acts, the court must order arbitration unless it finds that "the making of the agreement or" the "failure to comply therewith" is in issue. In such a case, a "summary" trial (which may be a jury trial) is held. After trial, the court dismisses the proceeding if it finds against the moving party on either issue.

None of these statutes provide that the party opposing arbitration may raise any matters in defense except the existence of the agreement or

his willingness to comply with it. The Uniform Act does not recognize the latter ground. This seems proper, for if the respondent is willing to submit to arbitration, he should have no objection to an order directing arbitration. The provisions of the Uniform Act, therefore, seem preferable in this regard. But none of the statutes recognize that any other grounds for resisting an order to compel arbitration exist. The California act does provide that upon application for a stay of judicial proceedings, the opposing party may show that the applicant is in default in proceeding with arbitration.[45] But, under the terms of the California act, this showing can only be made in the court where the action is pending. There is no provision for such a showing in the court having jurisdiction to order arbitration.

Yet, it is clear from the cases that matters in defense do exist. In R.F.C. v. Harrisons & Crosfield,[46] the court, in discussing the federal Arbitration Act which, like the California statute, provides that arbitration agreements are irrevocable save for such reasons as exist in law or "in equity" for the revocation of any contract, said: "For as a court, when asked to enter an order under the federal Arbitration Act, requiring a party to arbitrate as he promised, sits 'in equity,' passing on a prayer for specific performance, it must take into account equity considerations, and notably laches."

No California case has been found specifically applying the defense of laches, although the California courts recognize that the proceeding to enforce arbitration is essentially one in equity for specific performance.[47] However, under the doctrine of waiver the courts have held that a person loses his right to arbitration for conduct which, in substance, amounts to laches.[48]

In view of the fact that defenses to an application for relief under the arbitration law do exist -- whether under the name of waiver or laches is unimportant -- it is recommended that specific statutory authority be provided to raise these issues either upon a motion for an order to compel arbitration or upon a motion to stay arbitration or judicial proceedings.

FINDINGS REQUIRED FOR RELIEF

The California[49] and New York[50] laws provide that the court shall order arbitration if it finds that the existence of the arbitration agreement and refusal to comply therewith are not in issue. If these matters are in issue, there is a trial. If the court then finds that the respondent has not refused to arbitrate, the proceeding is dismissed. The Uniform Act[51] provides that the respondent may deny the existence of the agreement only. There is no provision for denying refusal to comply. The Uniform Act then provides that if the court finds for the respondent, the application must be denied. Thus, the court cannot dismiss the application under the Uniform Act upon a finding that the respondent did not refuse to arbitrate.

The Uniform Act provisions are probably based upon the supposition that if the respondent has not refused to arbitrate and is willing to do so, he cannot have any reason to complain about an order to arbitrate.

The Uniform Act seems to simplify the issues upon an application for relief. The court does not need to inquire into nor make findings concerning the willingness of the respondent to arbitrate. It need determine only the existence of the agreement to arbitrate. If this is found, and no waiver by the applicant is found, arbitration is ordered.

As the provisions of the Uniform Act would simplify enforcement

procedures without any serious injury to respondents, it is recommended that the Uniform Act's provisions be approved.

FORM OF RELIEF

All of the arbitration laws discussed here[52] provide that the court "shall" order arbitration upon the requisite showing. Apparently, little or no consideration has been given to the fact that the parties may have agreed to arbitrate only a portion of their controversy and it may be more expeditious to try the non-arbitrable issues first. For instance, if an insurance contract provided for arbitration of the amount of an insured loss, and the insurance company denied liability because of fraudulent destruction of the insured property, it would be more expedient to try the issue of liability first and defer arbitration until it was determined that the insurance company would be liable for such loss. If upon the trial of liability it was determined that the company was not liable, there would be no need to order arbitration. Under the present California law and the proposed Uniform Act, the court would apparently be forced to order arbitration upon application even though the expense of such a proceeding might prove to be totally wasted after the trial on the basic issue of liability.

The New York Legislature recognized this problem when it recently adopted legislation providing for enforcement of "appraisal" agreements. The New York Civil Practice Act now contains the provision:[53]

> The order shall direct the parties to proceed to arbitration . . . except that if the court or judge shall find that it would be inequitable to require such arbitration prior to the determination of other controversies existing between the parties, it may order that the arbitration be stayed until

such determination or until such time as it shall specify.

This provision applies only to appraisal agreements. As it has been held that valuation questions are subject to arbitration in California under properly drawn agreements,[54] such a provision should be applicable to any application for relief under the California arbitration law.

DETERMINING ARBITRABILITY

The original draft of the Uniform Act contained a provision in brackets which is not contained in the present Act. The idea was to leave the determination of the question involved to the individual states. Section 2 of the original draft provided:[55]

> On application of a party . . . the court shall order the parties to proceed with arbitration unless the opposing party denies the existence of the agreement [or of a dispute within its terms] or his refusal to arbitrate.

Apparently, the bracketed words were to make it clear that the court must find that parties agreed to arbitrate the particular dispute sought to be arbitrated. This Commission received a letter in regard to this subject with the following observation:[56]

> The practice of some courts upon a motion to compel arbitration seems to be to make only a perfunctory finding that there is an arbitration clause, and, upon such a finding, to order the parties to proceed to arbitration. Especially in the case of collective bargaining agreements, however, the presence of a provision calling for arbitration of grievances is not automatically an agreement to arbitrate all disputes; and certain disputes may, in fact, not be within the purview of the arbitration agreement. Section 1282 should, therefore, be redrafted in order to emphasize that a trial is in order wherever the resisting party asserts, even though there be an arbitration provision, the agreement does not cover the particular dispute in question and that therefore the making of the agreement to arbitrate is in issue.

The bracketed words were placed in brackets in the draft because it

was felt that they might constitute an invitation to the courts to decide arbitrable issues on the merits under the guise of determining whether there is a dispute within the meaning of the agreement. These words, however, were deleted from the Uniform Act on motion of the California Commissioner, Mr. Dinkelspiel.[57] He stated in support of his motion:[58]

> It seems to me that the bracketed portion Mr. Pirsig referred to, that is, the issue of whether there is a dispute under the terms of the contract is really the guts of the entire matter, and it would seem to me that that issue is one that should be determined by arbitration. One party would claim there is a dispute. The other party denies there is a dispute. That is something for the arbitrators to determine . . . . It doesn't seem to me that that should be left to the court if we are going to have arbitration because otherwise the entire statute is meaningless in that practically every attempt to arbitrate would end up in court.

At the present time, it is well settled that whether the parties have agreed to arbitrate a particular dispute is a question for judicial determination unless the parties have agreed that the question of arbitrability should also be left to the arbitrators. In McCarroll v. L. A. County Dist. Council of Carpenters,[59] the Supreme Court held:

> The arbitrability of a dispute may itself be subject to arbitration if the parties have so provided in their contract. . . . Of course, even when the parties have conferred upon the arbiter the unusual power of determining his own jurisdiction, the court cannot avoid the necessity of making a certain threshhold determination of arbitrability, namely, whether the parties have in fact conferred this power on the arbiter.

In Pari-Mutuel Employees' Guild v. L. A. Turf Club,[60] Justice Ashburn stated:

> As a general rule, the question of the existence of an agreement to arbitrate and of the scope of the arbitration thereunder are issues which, in the first instance, the code refers to judicial action . . . .

> In this state it is held that the question of arbitrability may be submitted to the arbitrators if the parties so agree.
>
> It is for the Court to determine whether the contract contains a provision for the arbitration of the dispute tendered, . . . .

Thus, under the present language of the statute, it is the duty of the court upon an application to compel arbitration to determine whether the parties have in fact agreed that the issue is to be arbitrated. This seems proper. No one should be compelled to arbitrate a question unless he has agreed to do so; hence, before a court should order arbitration, it should determine whether the parties in fact agreed to arbitrate the issue to be decided. But, the bracketed language is unnecessary to achieve this result. If a court does not perform this function under present practice, it is not because the law is inadequate, it is because the court is not performing its legal duty as declared by the statutes and the cases. As it is not believed that the language will add anything, it is recommended that it be omitted.

DENIAL OF ARBITRATION FOR LACK OF MERIT

Related to the previous discussion is the question of the arbitrability of unsubstantial disputes. The Uniform Arbitration Act contains the provision that:[61]

> An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

This provision was inserted to meet certain New York cases which held that there was no arbitrable dispute because the claim sought to be arbitrated totally lacked merit. The case of Intern. Ass'n of Machinists

v. Cutler Hammer[62] has evoked strong criticism.[63] There, a contract provided that a Union and an employer would meet "early in July 1946 to discuss payment of a bonus for the first six months of 1946." A dispute arose as to whether this was an agreement to pay a bonus and to discuss the amount thereof, or whether this was merely an agreement to discuss the payment of a bonus and nothing more. The employer, of course, argued that as the matter had been discussed, he had performed all that the contract required. A clause in the contract provided for arbitration of any disputes as to the meaning of the contract. The New York Supreme Court ordered arbitration. The Appellate Division reversed[64] on the ground that there could be no dispute as to the meaning of the contract. The Court of Appeals affirmed the Appellate Division without opinion. Later, in General Electric Co. v. United Electrical Etc. Workers,[65] the New York Court of Appeals said: "If there is no real ground of claim, the court may refuse to allow arbitration, although the alleged dispute may fall within the literal language of the arbitration agreement."

These cases were cited and applied in Pari-Mutuel Employees' Guild v. L. A. Turf Club.[66] There a contract provided that certain employees should "be assigned to a selling window each day and sell tickets each race." There was an arbitration clause in case of disputes, with the proviso: "The arbitrator shall not modify, vary, change, add to, or remove any terms or conditions of this Agreement." The Union felt that an undue burden was placed on these employees and that they should be relieved of the assignment to selling windows. The Union invoked a clause of the contract which said that "Any question of undue

burden on any individual shall be referred for review and decision to the Labor-Management Committee . . . ." If the Committee could not agree, the matter was subject to arbitration.

The court held there was no arbitrable issue, as the contract specifically provided that these employees were to be assigned to selling windows and the arbitration clause prohibited the arbitrator from modifying the contract.

It is submitted that the Pari-Mutuel case can be distinguished from the New York cases. In the Pari-Mutuel case, the contract provided that the arbitrator would have no power to modify any provision of the contract. Hence, it could not be said that the employer had agreed to arbitrate the dispute involved, for the contract specified that the designated employees should be assigned to selling windows. The employer had not agreed that the arbitrator should have power to modify this provision. This is quite different from the statement that "the court may refuse to allow arbitration, although the alleged dispute may fall within the literal language of the arbitration agreement." In the latter case, it is clear that the court is deciding a matter that the parties agreed would be decided by the arbitrator.

The California cases have generally held that a court cannot decide the merits of the issue to be arbitrated in determining its arbitrability.[67] No California cases, other than the Pari-Mutuel case, have been found that indicate that the court may refuse to order arbitration of a question the parties have agreed to arbitrate because it is of the opinion that there is no merit to the controversy. Because of the uncertainty that the Pari-Mutuel case may have injected into the law of the State, it is recommended

that the provision of the Uniform Act be adopted. This will make it clear that the only issue to be decided by the court is whether the parties agreed to arbitrate the dispute, and not whether there is any merit to the claim.

## APPOINTMENT OF ARBITRATORS BY COURT

### Generally

Common to all modern arbitration statutes is a provision that the court may appoint an arbitrator if the parties refuse to do so.[68] This power was not given to courts at common law, and the arbitration failed if an arbitrator was not selected in the manner specified by the parties. Such a provision is essential to make arbitration effective. Hence, a provision for court appointment should be provided in the California arbitration statute.

### Neutral and Party Arbitrators

The Uniform Act[69] introduces into statutory form the concept of a neutral arbitrator. The Commissioners recognized what has been pointed out by our consultant[70] that in many instances the arbitrator appointed by a party is not expected to be impartial and that a third arbitrator selected by the parties' arbitrators is the only neutral member of the arbitral panel. No reference to this fact is made in the present California act or the New York statute.

In the Uniform Act, the Commissioners provided that if for any reason any arbitrator ceases to act, the remaining arbitrator or arbitrators appointed as neutrals may continue with the hearing and determination of the controversy. The Commissioners considered a proposal to permit the

court to appoint only neutral arbitrators. They finally rejected this because they believed it would give a party the power to withdraw his arbitator if he felt the arbitration was going badly.[71] The only provisions left in the Uniform Act which distinguish between neutral andparty arbitrators are section 5(c), providing for the continuation of a hearing by the neutral arbitrator if a party arbitrator cannot act, and section 12(a)(2) providing that an award may be vacated if there was evident partiality shown by a neutral arbitrator.

Our consultant has proposed that the terms "neutral arbitrator" and "party arbitrator" be defined.[72] Like the Uniform Law Commissioners, he proposes that the court be empowered to appoint all arbitrators. A "neutral arbitrator" would be one selected jointly by the parties or by the court if the parties are unable to select. Probably there should be added to this class those arbitrators or umpires selected by the party arbitrators. A "party arbitrator" would be an arbitrator selected by a party, or the court for him, to represent him on an arbitral board or panel.

The consultant has distinguished between the powers and duties of party arbitrators and neutral arbitrators. This will be discussed later. At this point, it is only necessary to consider whether the court should be empowered to appoint all arbitrators or only thosearbitrators that are neutral. In view of the conclusion of the Uniform Law Commissioners and the recommendation of our consultant, it is recommended that the arbitration law to be proposed provide for the appointment of any arbitrator by the court.

Selecting the Arbitrator

Before leaving the subject of court appointment, one more matter should be considered. Our consultant has a new method of selecting an arbitrator by the court.[73] He has proposed that in appointing a neutral arbitrator, the court shall nominate 5 persons from lists of qualified arbitrators supplied by the parties, "recognized governmental agencies," or private impartial associations concerned with arbitration. The parties must designate the neutral arbitrator to be appointed within 5 days after receipt of the list. If the parties fail to do so, the court shall appoint the arbitrator from among the nominees.

In support of this proposal, the consultant feels that this will result in the appointment of qualified persons either nominated by the parties or suggested by the federal or state mediation and conciliation services or the American Arbitration Association or similar groups. The procedure also gives the parties a final opportunity to jointly agree on an arbitrator, and provides a method for breaking the deadlock if they cannot agree.

The principal argument to be made against the proposal is that it is cumbersome and will slow down the arbitration process. First, the applicant for appointment must submit a list, presumably when he files his motion with the court. Five days later, when the respondent makes his return, he files a list of nominees. The court, instead of selecting one arbitrator, must select 5 nominees. If the parties do not submit lists of nominees, the court must solicit lists from the organizations mentioned. Finally, the court prepares its list and sends it to the parties. In 5 more days the parties try to select an arbitrator from the list. Failing

this, they again must apply to the court for the selection of an arbitrator.

As indicated at the beginning of this discussion of enforcement procedures, the remedies adopted should preserve the advantages of the arbitral process -- the speed, flexibility, and lack of formality. It is submitted, that the proposed selection procedure introduces delay, formality and inflexibility and should not be adopted by the Commission. Naturally, this will not prohibit a court from requesting nominations by the parties or from asking that the parties submit the recommendations of impartial organizations. However, it is submitted that a court can be relied upon to use its discretion in this regard without imposing this duty as a statutory requirement.

COMPELLING THE ARBITRATORS TO ACT

Both the Uniform Act[74] and the New York arbitration law[75] provide that, on application, the court may direct the arbitrators to proceed promptly with the hearing and determination of the controversy. No similar provision is contained in the present California statute.

A provision such as this provides protection against the appointment of an uncooperative or recalcitrant arbitrator by one party. It is recommended that it be included in the California law.

## Footnotes

1. See Arbitration: Valuations, Appraisals and Non-Justiciable Disputes, notes 112-115 and accompanying text.
2. Sturges, Commercial Arbitration and Awards 253-262 (1930)
3. The case most commonly cited for the proposition that arbitration agreements are revocable actually involved the enforcement of a bond. Vynior's Case, 8 Coke Rep. 81b, 77 Eng. Rep. 597 (1609).
4. The former California statute was of this type. Code of Civil Procedure Section 1283 (Deering 1927). Arkansas, Delaware, Idaho, Montana, Virginia and West Virginia are among the states retaining this system of statutory arbitration.
5. Many of the modern enactments are based on the New York Arbitration Law enacted in 1920. See, Sturges, op. cit. note 2, Section 27.
6. Pac. Veg. Oil Corp. v. C.S.T., Ltd., 29 Cal.2d 228, 240 (1946).
7. Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, 159 (1916)
8. In re Curtis and Castle, 64 Conn. 501, 30 Atl. 769 (1894)
9. Re Smith, 281 Pa. 223, 112 Atl.2d 625, 55 A.L.R.2d 420 (1955), appeal dismissed, 350 U.S. 858 (1955).
10. 6 Williston on Contracts Sections 1921 and 1921A (Rev. Ed. 1938).
11. Sturges, loc. cit. note 2.

12. Munson v. Straits of Dover S.S. Co., 102 F. 926 (2d Cir. 1900).

13. Vynior's Case, 8 Co. Rep. 81b, 77 Eng. Rep. 597 (1609).

14. Wilson v. Barton, Nels. 148, 21 Eng. Rep. 812 (1671).

15. Henderson v. Cansler, 65 N.C. 542 (1871).

16. Code of Civil Procedure Section 1283 (Deering 1927).

17. New York Laws 1920 c. 275.

18. New York Civil Practice Act Sections 1450, 1459 (Clevenger 1959).

19. New York Civil Practice Act Section 1450 (Clevenger 1959).

20. Sturges, op. cit. note 2, Section 27.

21. See Proceedings in Committee of the Whole, Uniform Arbitration Act, National Conference of Commissioners on Uniform State Laws, August 9-14, 1954, p. 9H.

22. Stats. 1927 c. 225.

23. Code of Civil Procedure, Section 1282; Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 347 (1947).

24. Trubowitch v. Riverbank Canning Co., note 23, supra.

25. See 3 Am.Jur., Arbitration, Section 79, note 7.

26. Kagel, Study, p. 10.

26a. Uniform Act Section 18; New York Civil Practice Act Section 1450; Code of Civil Procedure Section 1282.

27. Uniform Act Section 16.

28. Code of Civil Procedure Section 1282.

29. N.Y. Civil Practice Act Section 1450.

30. Code of Civil Procedure Section 1290.

30a. Code of Civil Procedure Section 1282.

31. N.Y. Civil Practice Act Section 1450.

32. Uniform Act Section 16.

33. Trubowitch v. Riverbank Canning Co., note 23, supra.

34. 9 U.S.C. Section 4.

35. Section 2.

36. Civil Practice Act Section 1458 (2).

37. Section 5(a).

38. Section 2(d).

39. Code of Civil Procedure Section 1284.

40. Civil Practice Act Section 1451.

41. 9 U.S.C. Section 3.

42. Section 2.

43. Civil Practice Act Section 1450.

44. Code of Civil Procedure Section 1282.

45. Code of Civil Procedure Section 1284.

46. 204 F.2d 366, 37 A.L.R.2d 1117 (1953).

47. Trubowitch v. Riverbank Canning Co., note 23, supra.

48. See Feldman, Arbitration Law in California, 30 So.Cal. L. Rev. 375, 429-440 (1957); cases are collected in a note at 37 A.L.R.2d 1125.

49. Code of Civil Procedure Section 1282.

50. Civil Practice Act 1450.

51. Section 2.

52. Uniform Act Section 2; Code of Civil Procedure Section 1282; N.Y. Civil Practice Act Section 1450; 9 U.S.C. Section 4.

53. Civil Practice Act Section 1340.

54. Solari v. Oneto, 166 Cal.App. 2d 145 (1958).

55. Proceedings in Committee of the Whole, Uniform Arbitration Act, August 16, 1955, p.5.

56. Letter from David Freeman to Law Revision Commission, June 12, 1959.

57. 1955 Proceedings, 6-10.

58. Ibid., at 7.

59. 49 Cal.2d 45, 65 (1957).

60. 169 Cal.App.2d 571, 578 (1959).

61. Section 2(e).

62. 297 N.Y. 519, 74 N.E.2d 464 (1947).

63. Articles critical of this decision are collected in a note at 11 Arb.Jour. n.s. 135.

64. 271 App.Div. 917, 67 N.Y.S.2d 317.

65. 300 N.Y. 262 (1949).

66. 169 Cal.App.2d 571 (1959).

67. "The trial court fell into the error of attempting to decide the merits of the controversy." Krug v. Republic Pictures Corp., 120 Cal.App.2d 593, 597 (1953).

68. Sturges, op. cit. note 2, 357.

69. Section 5(c).

70. Kagel, Study 14.

71. 1955 Proceedings, 16.

72. Kagel, Study 13.

73. Ibid. 14, 16.

74. Section 5(a).

75. Civil Practice Act Section 1454 (3).