5/9/60

Memorandum No. 43 (1960)

Subject: Study No 32 - Arbitration

Attached to this memorandum as Exhibit I is the portion of the arbitration statute that has been considered by the Commission. Because the language of this draft was taken from three different sources, it is not presented here in strike-out and underline.

Exhibit II is the remainder of the draft prepared by the staff to carry out the Commission's tentative recommendations. Exhibit III is the remainder of the consultant's draft that has not been considered by the Commission. Inserted in Exhibit III is the present Section 1292 of the Code of Civil Procedure which is not amended in that draft.

In drafting the revised statute, several problems were encountered. One concerns the use of the word "petition". The direction of the Commission was to use the word "petition" instead of "motion" where appropriate because motions are generally associated with pending cases and "petition" denotes an original pleading in a case. Unfortunately, virtually every application to the court under the arbitration act may be the initial pleading in the court proceedings connected with the arbitration. To be consistent, therefore, the word "petition" should be used to refer to applications to vacate, modify and correct awards as well as applications to obtain an order compelling arbitration. But, in many cases, the designation will not carry out the purpose, for there will have been a previous application. In such cases, the statute will refer to a "petition"

when it actually refers to a motion -- an application for an order in a pending proceeding.

There are several solutions for the problem: (1) Use the word "petition" throughout. As indicated, this will be inaccurate in many cases. In any event, it will then be necessary to provide that petitions under this title will be treated as motions. (2) Use the Uniform Act solution and use the word "application". Then it is necessary to provide that "all applications shall be by motion." Of course, it could be provided that an original application shall be by petition and all subsequent applications by motion; but it would still be necessary to provide that, for purposes of hearing, the original petition will be treated like a motion. (3) Use the California act solution and refer to an application to compel arbitration as a "petition" and then use the word motion for all other applications. (4) Use the consultant's recommendation, and simply refer throughout the act to "motion". This solution is consistent with Section 1003 of the Code of Civil Procedure, which provides: "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion." Since we are concerned only with applications for orders, there is no reason not to call them "motions" as provided in this section. Moreover, by doing so we clearly pick up the body of law that has grown up around motions -- such as that findings of fact are not required (DeLong v. Miller, 133 Cal. App.2d 175 (1955)).

Another problem concerns the form of Section 1282. The Uniform Act provides that upon application for an order compelling arbitration, the court must order arbitration unless the opposing party denies the existence

of the agreement. The California act is somewhat similar, for the court must order arbitration unless it finds the existence of the agreement in issue. Under the draft approved by the Commission, the court orders arbitration only if it determines that there is an agreement to arbitrate the controversy. This language seems to shift the burden in the case from the person resisting arbitration to the person seeking arbitration. I raise this problem, not because I object to the Commission's solution, but merely to be sure that the Commission is fully aware of the difference in the language chosen. As a matter of fact, the language of the Commission seems to tie in better with Section 1293 (1)(e). Under the Uniform Act, from which the latter section is taken, if an order for arbitration is made without objection from the party against whom the order is made, it may be argued that the court didn't determine anything except that a motion was made and not objected to. Hence, the opposing party may have the issue of "no agreement" available to him on a motion to vacate. Under the Commission's language, the duty of the court to determine the question of the existence of the agreement upon every motion to compel arbitration is clear. Therefore, on proceedings to vacate, the lack of an agreement may not be raised by the party against whom the order was made, for the court resolved the issue adversely.

The Commission asked that the staff determine the necessity for findings under the present law. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335 (1947), held that findings are required when a petition for an order compelling arbitration is denied. The court reasoned that such an application is really a suit in equity for specific performance, and hence a decision upon such an application requires findings like any other determina-

tion in an equity case. The court also relied on the language of Section 1282 which uses the word "finds" in several places.

The language in Trubowitch is broad enough to require findings even if an order compelling arbitration is granted. However, no case has been found specifically holding that findings are required in such a situation. It may be that Trubowitch will be limited to determinations which finally dispose of the case. It has been held that findings are not required for interlocutory orders and judgments. (David v. Goodman, 114 Cal. App.2d 571, 575 (1952) hg. den., 114 Cal. App.2d 577.) It has also been held that an order compelling arbitration is not appealable (Jardine-Matheson Co. v. Pacific Orient Co., 100 Cal. App. 572 (1929); and the Supreme Court has indicated that the reason an order compelling arbitration is not appealable while an order denying arbitration is, even though neither is expressly made appealable by statute, is because the former is interoluctory and the latter is final (Sjoberg v. Hastorf, 33 Cal.2d 116 (1948)). Therefore, it may be that the Supreme Court will also hold that findings are not required to support orders upon interlocutory matters in arbitration proceedings.

The provision I placed in the statute relating to findings has been placed in Section 1297, among the sections dealing generally with court proceedings. Merely to present the issue, it has been drafted to require findings when final orders are made and to require no findings when interlocutory orders are made. The Commission did not consider this distinction, and it may wish to do away with findings altogether. This provision was included to present this problem.

The remaining comments are directed towards the sections of the staff's draft that have not as yet been considered by the Commission.

Section 1286. (5) This is a provision suggested by the Commission.

(6) This has not been passed on by the Commission. It is from the Uniform Act, and is presented here so that a decision may be made as to whether it should be included. Omitted from this section is any reference to obtaining information outside the presence of the parties. The consultant has recommended that such a provision be included.

1287. This is from the Uniform Act. The adoption of a provision of this nature was recommended by the consultant.

1288. (1) In accordance with the Commission's and consultant's recommendations, the power to issue subpenas has been given to the neutral arbitrator. Reference is made to the chapter on production of evidence. That chapter already contains standards for the issuance of subpenas duces tecum, provisions relating to the distance that a witness can be compelled to travel, procedures for citing a person for disobedience if the issuing officer is not a judge, etc. It seemed advisable, therefore, to refer to that chapter rather than to attempt to duplicate much of the same material in the arbitration statute.

(2) This is from the consultant's statute.

(3) The substance of the first sentence is as recommended by the consultant. The form of the subdivision, including the second sentence, is taken from the Administrative Procedure Act, Government Code Section 11511.

(4) The witness fees provision is similar to that recommended by the consultant. The added phrase, "other than the parties," is taken from the Administrative Procedure Act, Section 11510(c). A sentence has been added to provide for the payment of the fees for a witness subpenaed

by the neutral arbitrator.

1289. (1) This subdivision is as recommended by the consultant, except that the duty to deliver the award has been placed here upon the neutral arbitrator. The section is similar to Uniform Act Section 8.

(2) This, too, is as recommended by the consultant and is similar to Uniform Act Section 8.

1290. The Commission could not agree on the inclusion or exclusion of a provision of this nature at the March meeting. The section here is as recommended by the consultant and is similar to Uniform Act, Section 9; however, the phrase "if the award has not been entered as a judgment" has been included for reasons that will appear when the procedure for filing awards with the clerk of the superior court is considered. This procedure was drafted with the idea that all of the efforts to modify, correct or vacate an award should be completed before the award may be filed as a judgment (except in the case of fraud). Therefore, the arbitrator should have no power to modify or correct the award after it has been entered as a judgment. The portion of the Uniform Act permitting the arbitrator to "clarify" the award is omitted.

1291. The substance of this section is as recommended by the consultant and the Commission.

1292. This section, together with the remainder of the title on arbitration, include the provisions for filing an award with the clerk of the superior court and entry of the award as a judgment upon such filing. It is contemplated that all attacks on the award, except for fraud, will be completed before the filing. As this procedure originated with the Commission at the March meeting, it has not been considered in the

consultant's study and is not contained in the Uniform Act.

(1) This subdivision provides that, after ten days notice and within one year after delivery of the award to him, a party may file an award with the clerk, who shall thereupon enter the award as if it were a judgment in an action, unless an application or motion to vacate, modify or correct the award has been made.

(2) The first sentence is similar to existing Section 1292 which the consultant recommends be retained. The second sentence reflects the decision of the Commission to extend the arbitration statute to contracts which may be entered into subject to the approval of a court, such as separation and property settlement agreements, agreements determining the distribution of estates, etc.

(3) This provision was placed here to carry out the recommendation that awards made pursuant to oral agreements are enforceable.

(4) This reflects the Commission's decision that an award must become void unless it is filed as provided by the statute within one year from delivery. This is contrary to the recommendation of the consultant, is contrary to the Uniform Act, is probably contrary to existing California law and is contrary to the United States Arbitration Act.

The Uniform Act has no limit on the time within which a motion to confirm an award may be made. The United States Act has a one year time limit, but this merely cuts off the right to use the summary procedures created by the Act. After the year elapsed, a person may sue on the award as if it were a part of the basic contract as at common law. (Kentucky River Mills v. Jackson (6 Cir. 1953), 206 F.2d 111, cert. den. (1953)

346 U.S. 887.)

It appears likely that the California courts would follow the federal rule. There is no case in California directly in point. However, Aurandt v. Hire, 175 A.C.A. 806 (1959), is analogous. The court had before it in that case an award which could not be confirmed under the California arbitration laws, not for lapse of time, but because the arbitration award was not made in California (although the evidence was taken in California). The trial court vacated the award and denied a motion to confirm. The appellate court pointed out that the general rule is that a foreign award will generally be enforced as a contract. Therefore, it would be unfair to the plaintiff to deny confirmation and order the award vacated merely because the award was not made in the state and thereby prejudice his right to bring an action on the award either in this state or elsewhere. The court thereupon reversed the order denying confirmation of the award and directed that the petition for confirmation be dismissed, and reversed the order vacating the award in its entirety. Thus, it appears that the California courts are willing to permit an action on an award that for some reason is not subject to confirmation under the arbitration laws.

In view of this situation, this subdivision will have some of the following results: It will render null and void arbitration awards so far as California courts are concerned after one year. This may cause some hardship, for "if parties accept and abide by an award there is no need for further judicial procedure. And ordinarily such procedure is not initiated unless it

be the desire of a party that an official record of confirmation and judgment be made." (Wetsel v. Garibaldi, 159 C.A.2d 4, 11 (1958).) If the award requires actions by the parties extending over a period of a year, judicial intervention for enforcement of the award may not be required until after the award has become void. Then a plaintiff who wants relief against a defendant over whom jurisdiction can be obtained in a Uniform Act state is fortunate. He will be able to have his award confirmed in such state as a judgment, and then return to California to sue on the judgment. Also fortunate will be the plaintiff who can discover that his contract relates to interstate commerce, for he will be able to sue on the award in a federal court, and if he obtains a judgment, will be able to sue on the judgment in California. But the California plaintiff whose award is against a person within the jurisdiction of only the California courts will have to resort to arbitration all over again. If there has been a determination of the amount to be paid under a lease, or if there has been some other determination requiring actions to be taken extending over a period of time, the hardship may be quite severe if the second arbitrator makes a different decision than the first.

It is difficult to see the public policy which requires that awards become void if they are not filed as permitted by the statute. It seems to be a reflection of the old common law attitude that arbitration is somehow undesirable. This attitude has been criticized with the following words: "It is surely a singular view of juridical sanctity which reasons that, because the Legislature has made a court, therefore everybody must go to the court." (Hough, J. in U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006, 1009-1010 (S.D.N.Y. 1915).) At common law this attitude resulted in a refusal to specifically enforce an arbitration agreement, but

at least the award was enforced as the contract of the parties. Under the present proposal, the arbitration agreement is enforceable, but the award doesn't even rise to the dignity of an oral contract. Oral contracts are enforced until two years after breach even though there is a total absence of writing. Here, the award will become void after one year after it is made regardless of the fact that it is in writing, and regardless of the fact that the parties may have agreed in writing that the written award was to form part of their contract.

1293. This is Section 12 of the Uniform Act as recommended by the Commission. It has been modified to a certain extent to conform with the remainder of this proposed statute. The consultant recommended the existing California section, but also recommended that the last sentence of this section be included therein.

1294. This section is substantially as recommended by the consultant and as contained in both the Uniform Act and the existing California statute. It has been modified to correspond with the filing procedure. The notice provided is 90 days. The consultant recommended 30.

1295. (1) This section was created to permit a party that has been notified that an award will be filed to obtain a stay until he can present a motion to modify, correct or vacate after proper notice. The idea comes from the former California arbitration statute which provided for a stay of entry of judgment if the submission had been made a rule of court.

(2) This was put in the statute to conform to the idea contained in the Uniform Act and recommended by the consultant that a denial of a motion to vacate, modify or correct an award should automatically result in the entry of the award as a judgment.

1296. This is the venue section. It was taken from the Uniform Act. The consultant has recommended a different scheme which follows the existing California statute. The Commission has not considered the matter as yet. The principal difference between the Uniform Act system and the California scheme is that the Uniform Act picks a court to have jurisdiction over the original judicial action and then confers jurisdiction upon that court over all subsequent judicial actions growing out of the particular arbitration proceeding, while the California statute confers jurisdiction on different courts upon a determination of which one would be most conveniently located to hear the particular kind of motion.

(1) This subdivision was taken from Section 2(c) of the Uniform Act. It was placed here because it seemed desirable to place all venue provisions in a single section.

(2) This subdivision places in the venue section the Commission's decision that motions to stay actions are to be made in the court where the action is pending. The consultant has recommended the substance of this subdivision.

(3) This subdivision was taken from Section 18 of the Uniform Act. It has been slightly modified to fit into this tentative statutory scheme, but carries out the idea that a single court is to have jurisdiction of all enforcement procedures unless it otherwise directs.

(4) This subdivision was included to make clear that venue for filing an award as a judgment is the same as venue for making a motion. Construed with subdivision (3), this subdivision is intended to provide that motions subsequent to service of notice of intention to file should be made in the court where the award is to be filed.

1297. (1) This subdivision is taken from Section 16 of the Uniform Act. The consultant has recommended a hearing procedure similar to that provided here, but has recommended 10 days notice on all motions.

(2) This subdivision is substantially as recommended by the consultant and as contained in the present California statute. The reference to motions to confirm that is in the consultant's recommended statute has been omitted to comply with the Commission's decision to abandon confirmation proceedings.

(3) The substance of this subdivision was recommended by the consultant.

(4) This provision presents the findings question discussed earlier.

1298. This section is taken from Section 19 of the Uniform Act. It differs in substance from the section on appeals recommended by the consultant in that this subdivision provides for an appeal from an order vacating an award only if a rehearing is not ordered while the consultant's recommendation is that any order vacating an award is appealable. The consultant's recommendation is in accordance with the existing California statute.

SECTION 3 and SECTION 5. These sections amend certain sections of the Civil Code and Code of Civil Procedure which relate to arbitration. The amendments delete certain provisions which are superseded by the arbitration statute.

SECTION 4. This section amends a section of the Uniform Sales Act that provides that a sales contract is avoided if a valuation fails without fault of the parties. This is amended because appraisal and valuation agreements will be enforceable under this statute.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

EXHIBIT I

An act to repeal Title 9 (beginning with Section 1280) of Part 3 of the Code of Civil Procedure, to add Title 9 (beginning with Section 1280) to Part 3 of the Code of Civil Procedure, to amend Section 1053 of the Code of Civil Procedure, and to amend Sections 1730 and 3390 of the Civil Code, all relating to arbitration.

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

SECTION 1. Title 9 (beginning with Section 1280) of Part 3 of the Code of Civil Procedure is hereby repealed.

SEC. 2. Title 9 (beginning with Section 1280) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 9. ARBITRATION

1280. As used in this title:

(1) "Controversy" includes any question arising between the parties to an agreement whether such question is one of law or of fact.

(2) "Agreement" includes agreements providing for valuations, appraisals and similar proceedings, and agreements between

employers and employees or between their respective representatives.

(3) "Written agreement" shall be deemed to include oral or implied agreement to extend the term of an expired written agreement.

(4) "Neutral arbitrator" means an arbitrator selected jointly by the parties to an agreement to arbitrate or their representatives or appointed by the court when the parties or their representatives jointly fail to do so.

1281. 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.

1282. (1) On petition of a party alleging the existence of a written agreement to arbitrate a controversy and that the opposing party refuses to arbitrate, the court shall order arbitration if it determines that such an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to arbitrate has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(2) If the court determines that there are other issues, not subject to arbitration, that are in litigation between the

parties, and the right to arbitrate is dependent upon a determination of such issues, it may order that the arbitration be stayed until such determination or until such earlier time as it shall specify.

(3) An order for arbitration may not be refused on the ground that the claim in issue lacks substantive merit.

1283. (1) Upon petition, the court may stay an arbitration proceeding commenced or threatened upon a showing that would be sufficient to cause the court to stay arbitration or to deny a petition to order arbitration under Section 1282.

(2) An action or proceeding involving an issue subject to arbitration shall be stayed by the court in which the action or proceeding is pending, but only if an order for arbitration has been made or a petition therefor has been filed. If the issue is severable, the stay may be with respect thereto only.

1284. (1) If the arbitration agreement provides or the parties agree upon a method of appointing an arbitrator, such method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been appointed, the court, on petition of a party, shall appoint one or more arbitrators.

(2) When a court has been requested to appoint a neutral-arbitrator the court shall nominate five persons from lists of

persons supplied jointly by the parties, or obtained from a governmental agency, or from private disinterested associations concerned with arbitration. The parties may within five days of receipt of such nominees from the court jointly select a single person by agreement or lot from such list, who shall serve as the court-appointed arbitrator. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

1285. Unless the parties otherwise agree:

(1) The arbitration shall be by a single arbitrator.

(2) If there is more than one arbitrator, the powers and duties of the arbitrators may be exercised by a majority of them if reasonable notice of all proceedings has been given to all arbitrators.

(3) If there is more than one neutral arbitrator, the powers and duties of a neutral arbitrator may be exercised by a majority of the neutral arbitrators.

1286. Unless the parties otherwise agree:

(1) The neutral arbitrator shall appoint a time and place for the hearing and cause notification to the parties and to the other arbitrators to be served personally or by registered or certified mail not less than seven days before the hearing. Appearance at the hearing waives notice. The neutral arbitrator may adjourn the hearing from time to time as necessary and, on request of a party and for good cause,

or upon his own determination, may postpone the hearing to a time not later than the date fixed by the agreement for making the award or to a later date if the parties consent thereto.

(2) The neutral arbitrator shall preside at the hearing, rule on the admission and exclusion of evidence and on questions of hearing procedure, and shall exercise all powers relating to the conduct of the hearing.

(3) The parties are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed.

(4) If an order directing arbitration has been made pursuant to Section 1282, the arbitrator may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear.

EXHIBIT II

[1286] * * * *

(5) An arbitrator who did not hear the evidence presented by the parties may not vote on the award.

(6) If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining neutral arbitrator or neutral arbitrators may continue with the hearing and determination of the questions submitted.

1287. A party has the right to be represented by an attorney at any proceeding or hearing under this title. A waiver thereof prior to the proceeding or hearing is ineffective.

1288. (1) Upon application of a party or upon his own determination the neutral arbitrator may issue subpenas for the attendance of witnesses and subpenas duces tecum for the production of books, records, documents and other evidence in accordance with Chapter 2 (beginning with Section 1985) of Title 3 of Part 4 of this code.

(2) The neutral arbitrator may administer oaths.

(3) On application of a party and for use as evidence and not for discovery, the neutral arbitrator may order the deposition of a witness who cannot be subpenaed or is unable to attend the hearing to be taken in the manner prescribed

by law for the taking of depositions in civil actions. When the witness resides outside the State and the neutral arbitrator has ordered the taking of his testimony by deposition, the neutral arbitrator shall obtain an order of court to that effect by filing a petition therefor in the superior court.

(4) All witnesses appearing pursuant to subpena, other than the parties, shall receive fees and mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in superior court. The fees and mileage expenses shall be paid by the party at whose request the witness is subpenaed. The fees and mileage expenses of a witness subpenaed upon the determination of the neutral arbitrator shall be paid for in the manner provided for the payment of the arbitrator's expenses.

1289. (1) The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all of the questions submitted to the arbitrators. The neutral arbitrator shall deliver a copy to each each party personally or by registered or certified mail or as provided in the agreement.

(2) The award shall be made within the time fixed therefor by the agreement, or, if not so fixed, within such time as the court orders on motion of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an

award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

1290. On application of a party made within ten days after delivery of the award to the applicant, if the award has not been entered as a judgment, the arbitrators may modify or correct the award upon the grounds set forth in subdivisions (1)(a) and (1)(c) of Section 1294. Written notice of the application shall be given to all other parties, stating that they must serve their objections thereto, if any, within ten days from the service of such notice. No such modification or correction may be made more than 25 days after delivery of the award to the applicant.

1291. Unless otherwise provided in the agreement to arbitrate, each party shall pay one-half of the neutral arbitrator's expenses and fees, together with other expenses incurred in the conduct of the arbitration, not including counsel fees or witness fees or other expenses incurred by the parties.

1292. (1) Not less than ten days after the filing of notice of intention to file the award with the clerk of the superior court and service of a copy of the notice upon all of the other parties, and not more than one year after the delivery of the award to him, a party may file the award with

the clerk of the superior court. The clerk shall enter the award as if it were a judgment in an action if:

(a) No motion to modify, correct or vacate the award has been filed by any of the parties to the arbitration, and

(b) No order staying the entry of the award as a judgment has been made.

(2) An award entered as a judgment has the effect of a judgment in a civil action and may be enforced as any other judgment or decree. If the award is upon a controversy that could be settled by a contract between the parties subject to the approval of a court, the award shall be given effect by such court in the same manner and to the same extent as a contract between the parties.

(3) An award made pursuant to an agreement not in writing may be enforced under this title in the same manner and to the same extent as an award made pursuant to a written agreement.

(4) Unless it is entered as a judgment in accordance with this title, the award is void for any purpose.

1293. (1) Upon motion of a party, the superior court shall vacate an award if:

(a) The award was procured by corruption, fraud or other undue means;

(b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(c) The arbitrators exceeded their powers;

(d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 1286, as to prejudice substantially the rights of a party; or

(e) There was no agreement to arbitrate the controversy and the issue was not adversely determined in proceedings under Section 1282 or 1283 and the party did not participate in the arbitration hearing without raising the objection.

(2) A motion under this section shall be made within 90 days after delivery of a copy of the award to the moving party and before the award has been entered as a judgment, except that, if the motion is predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

1294. (1) Upon motion of any party to the arbitration made within 90 days after the delivery of a copy of the award to such party and before the award has been entered as a judgment, the court shall modify or correct the award if:

(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting

the merits of the decision upon the issues submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(2) If the motion is granted, the court shall modify and correct the award so as to effect its intent and shall order the clerk to enter the award as so modified and corrected as a judgment of the court.

1295. (1) The court may make an order staying the entry of an award as a judgment to permit a party to make an application or motion to modify, correct or vacate the award.

(2) If the court denies a motion to modify, correct or vacate an award, the court shall order the clerk to enter the award as a judgment.

1296. (1) If the issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a superior court, the motion to compel arbitration shall be made therein. Otherwise, the motion shall be made in accordance with subdivision (3).

(2) A motion to stay a pending action or proceeding under subdivision (2) of Section 1283 shall be made in the court in which the action or proceeding is pending.

(3) Subject to subdivisions (1) and (2) an initial motion shall be made in the superior court of the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was

held. Otherwise, an initial motion shall be made in the superior court of the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, in the superior court of any county. All subsequent motions shall be made in the superior court hearing the initial motion unless the court otherwise directs.

(4) For the purpose of this title, the filing of a notice of intention to file an award for entry as a judgment shall be deemed to be the making of a motion.

1297. (1) Except as otherwise provided, a motion under this title shall be heard in the manner and upon the notice provided by law for the making and hearing of motions. Unless the parties have otherwise agreed, notice of an initial motion shall be served in the manner provided by law for the service of summons in an action.

(2) The party moving for an order vacating, modifying or correcting an award shall attach to such motion a copy of each of the following:

(a) The agreement to arbitrate.

(b) The names of the arbitrators.

(c) Each written extension of the time, if any, within which to make the award.

(d) The award.

(3) The court shall award costs upon any judicial proceeding under this title as provided in Chapter 6

(beginning with Section 1021) of Title 14 of Part 2 of this code.

(4) Findings of fact and conclusions of law shall be made by the court upon the determination of a question of fact under this title only if an order is made that is appealable under Section 1298.

1298. (1) An appeal may be taken from:

(a) An order denying a motion to compel arbitration under Section 1282.

(b) An order granting a motion to stay arbitration under Section 1283; except that no appeal may be taken from an order staying arbitration until the determination of other issues in litigation between the parties.

(c) An order granting or denying a motion to modify or correct an award.

(d) An order granting or denying a motion to vacate an award; except that no appeal may be taken from an order vacating an award if a rehearing is ordered.

(e) A judgment entered pursuant to this title.

(2) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

SEC. 3. Section 1053 of the Code of Civil Procedure is amended to read:

1053. When there are three referees [~~,-or-three-arbitrators,~~] all must meet, but two of them may do any act which might be done by all.

SEC. 4. Section 1730 of the Civil Code is amended to read:

1730. SALE AT A VALUATION. Subject to Title 9 (beginning with Section 1280) of Part 3 of the Code of Civil Procedure:

(1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or deos not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by chapters 4 and 5 of this act.

SEC. 5. Section 3390 of the Civil Code is amended to read:

3390. The following obligations cannot be specifically enforced:

1. An obligation to render personal service;

2. An obligation to employ another in personal service;

3. [~~An agreement to submit a controversy to arbitration;~~]

[4.] An agreement to perform an act which the party has not power lawfully to perform when required to do so;

[5.] 4. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or

[6.] 5. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

EXHIBIT III

SEC. 6. Section 1285 of said Code is amended to read:

1285. (a) Unless otherwise provided by the agreement:

(1) The neutral-arbitrator shall appoint a time and place for the hearing and unless otherwise mutually agreed to by the parties he shall cause notification to the parties to be served personally or by registered mail not less than 10 days before the hearing. Appearance at the hearing waives such notice. The arbitrator may adjourn the hearing from time to time as necessary, and, on request of a party and for good cause shown, or upon his own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award or, with the consent of the parties, to a later date.

(2) The parties are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Rules of evidence and rules of judicial procedure need not be observed so long as the hearing is fairly conducted.

(3) A neutral-arbitrator may not obtain information, advice, or other data, from outside the presence of the parties without disclosing his intention to do so to all parties to the arbitration and obtaining their consent thereto, except that an arbitrator may take judicial notice of matters

of which a court may take such notice.

(4) If an order directing arbitration has been made pursuant to Section 1282, the arbitrator may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear.

(5) Each party shall pay one-half of the arbitrator's total expenses and fees, together with other expenses deemed necessary by the neutral-arbitrator not including counsel, witness fees, or other expenses incurred by the parties in the conduct of the arbitration. Costs of motions to confirm, vacate, modify or correct an award, and the proceedings pursuant thereto, shall be awarded by the court pursuant to Section 1032 of this code.

(b) A party has the right to be represented by an attorney at any proceeding under this title, and a waiver of counsel prior to the hearing is ineffective.

(c) (1) A neutral-arbitrator may administer oaths.

(2) The neutral-arbitrator shall issue subpoenas and subpoenas duces tecum at the request of any party, or upon his own determination, in accordance with the provision of Section 1985 of this code. The process issued shall extend to all parts of the State and shall be served in accordance with the provisions of Sections 1987 and 1988 of the Code of Civil Procedure.

(3) All witnesses appearing pursuant to subpoena shall receive fees, mileage, and expenses in the same amount and

under the same circumstances as prescribed by law for witnesses in civil actions in a Superior Court. Fees, mileage and expenses shall be paid by the party at whose request the witness is subpoenaed.

(4) On application of a party a neutral-arbitrator may issue subpoenas for attendance at a deposition of a witness who cannot be subpoenaed to, or is unable to attend the hearing, for use as evidence but not discovery. The deposition may be taken in the manner and upon the terms designated by the neutral-arbitrator. The provisions of this code relating to depositions are, insofar as consistent herewith, applicable to this subsection.

(5) Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required may be reported by the neutral-arbitrator to the Superior Court in the county in which the attendance of the witness was required. Such court thereupon has power, upon notice, to order the witness to perform the omitted act, and any refusal or neglect to comply with such order may be punished as a contempt of such court.

SEC. 7. Section 1286 of said Code is amended to read:

1286. (a) The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the issues submitted to the arbitrator.

The arbitrator shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement, or, if not so fixed, within such time as the court orders on motion of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrator of his objection in writing prior to the delivery of the award to him.

(c) On application of a party made within 10 days after delivery of the award to the applicant, the arbitrator may modify or correct the award upon the grounds set forth in paragraphs (1) and (3) of subsection (a) of Section 10. Written notice of the application shall be given to all other parties, stating that they must serve their objections thereto, if any, within 10 days from the service of such notice. No such modification or correction may be made more than 25 days after delivery of the award to the applicant.

SEC. 8. Section 1287 of said Code is amended to read:

1287. At any time within 90 days after the award is delivered to a party he may make a motion to the court for an order confirming the award. The court shall grant such an order unless a timely motion to vacate, modify or correct the award has been filed. If such motion has been filed, the court shall proceed as provided in the next two sections.

SEC. 9. Section 1288 of said Code is amended to read:

1288 (a) Upon motion of a party the court shall vacate the award if it finds:

(1) That the award was procured by corruption, fraud or undue means;

(2) That the arbitrator was corrupt;

(3) That the arbitrator was guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or in engaging in other similar misconduct contrary to the provisions of Section 6, which would substantially prejudice the rights of the parties who made the motion;

(4) That the arbitrator exceeded his powers, or so imperfectly executed them that a mutual, final and definite award, upon the subject matter submitted, was not made.

(b) A motion filed under this section must be filed within 90 days after the award is delivered to the party making the motion, provided that if the motion is predicated upon corruption, fraud, or undue means, it may

be filed within 90 days after such grounds are known or should have been known.

(c) Where an award is vacated:

(1) The court may in its discretion direct a rehearing before a new arbitrator if the vacation was on grounds set forth in Section 9 (a)(1), (2) or (3). A new arbitrator shall be appointed as provided in Section 4.

(2) With the consent of the parties the court may in its discretion, direct a rehearing before the arbitrator who made the award in a case where the ground set forth in Section 9 (a)(4) was the ground for vacation.

(3) The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the motion to vacate the award is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

SEC. 10. Section 1289 of said Code is amended to read:

1289. (a) Upon motion of any party to the arbitration made within 30 days after delivery of a copy of the award to the moving party, the court shall modify or correct the award:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award;

(2) Where the arbitrator has awarded upon a matter not submitted to him, and the award may be corrected without affecting the merits of the decision upon the matters submitted;

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the motion is granted, the court shall modify and correct the award so as to effect its intent, and shall confirm the award as so modified and corrected. If the motion is denied, the court shall confirm the award as made.

SEC. 11. Section 1290 of said Code is amended to read:

1290. (a) "Court" as used in this title shall mean the following superior court:

(1) A motion for an order that the parties proceed to arbitration, made pursuant to Section 3, or a motion for the appointment of an arbitrator, made pursuant to Section 4, shall be filed in the county wherein any party resides or has a place of business or, where the agreement is to be performed, or, if no party has a residence or place of business in this State, and the place of performance is not specified in the agreement in any county in this State.

(2) A motion for a stay of an action, made pursuant to Section 3, shall be made to the court wherein the action is pending.

(3) Any motion made after the commencement of arbitration proceedings shall be made in the county wherein the arbitration is being, or has been, held.

(b) Written notice of the hearing of any motion authorized by this title shall be served upon the other parties to the arbitration agreement or their attorneys 10 days prior to the date set for the hearing.

(c) The party moving for an order confirming, vacating, modifying or correcting an award shall attach to such motion a copy of each of the following: the agreement to arbitrate, the name of the arbitrator, each

written extension of the time, if any, within which to make the award, and the award.

(d) Any motion filed under the authority of this title shall be heard in a summary way in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

SEC. 12. Section 1291 of said Code is amended to read:

1291. Upon the granting of an order confirming, modifying or correcting an award, judgment shall be entered in conformity therewith in the court wherein said motion was filed. The judgment when rendered by the court shall be docketed as if it were rendered in an action.

1292. The judgment so entered has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

SEC. 13. Section 1293 of said Code is amended to read:

1293. An appeal may be taken from an order denying a motion to compel arbitration made under Section 3; an order confirming, modifying, correcting or vacating an award; or from a judgment entered upon an award, as from an order or judgment in an action.

SEC. 14. Section 1294 is added to said Code to read:

1294. The making of an agreement providing for arbitration to be had within this State shall be deemed a consent of the parties thereto to the jurisdiction of the court to enforce such agreement by the making of any orders provided for in this title and by the entering of judgment on an award made under the agreement. An agreement made in this State which does not specify a place for the arbitration to be held shall be considered to provide for arbitration within this State.

Notices shall be served on an out-of-state party by personal service on such party, by registered mail sent to the last known address of such party, or in the manner provided in the agreement.