12/12/60

Memorandum No. 100(1960)

Subject: Study No. 32 - Arbitration

Attached to this memorandum is a revised recommendation and statute relating to arbitration. The yellow pages contain the revised recommendation. The blue pages contain portions of the arbitration statute that have been previously approved. The pink pages contain new material.

The staff, with the assistance of Commissioner McDonough, has made several revisions in the recommendation and the portion of the statute that appears on the blue pages. These revisions are not intended to change the substance of the previously approved tentative recommendation and statute except that Section 1280.2 was added at the suggestion of the Legislative Counsel. This is a very desirable addition.

On the pink pages, the staff has set forth a complete revision of the material pertaining to judicial proceedings. Hence, changes from previously approved text are not shown by the customary strike out and underline. So that you may more readily understand how the specific provisions contained on the pink pages fit into the overall enforcement scheme we submit the following brief outline of the enforcement provisions contained on the pink pages:

Judicial proceedings are commenced by filing a petition. Petitions are opposed by responses. If a response is not filed, the allegations of the petition are admitted. The allegations of a response are

controverted as a matter of law.

A petition to review an award must name as respondents all parties to the arbitration proceeding, and it may name any other person bound by the award. When a petition is properly served and filed, the court must either confirm the award as made, correct the award and confirm it as corrected, vacate the award or dismiss the proceeding. The court may vacate or correct an award only if a petition or response requests such relief. The court must dismiss a petition as to a particular respondent if that respondent was neither a party to the arbitration proceeding nor bound by the award. The court is also required to dismiss the proceeding if the award presented is "unlawful" within the meaning of that term as it is applied to contracts. This provision was added so that a court would not be required to confirm a patently illegal award presented to it after the time for attacking it has elapsed. As a court presented with an unlawful contract leaves the parties where it finds them, the court presented with an unlawful award should do the same thing and dismiss the proceeding.

Unconfirmed awards are deemed to be contracts between the parties. Confirmed awards result in judgments.

An article limiting the time within which post-award proceedings may be brought has been added. This article contains the four-year limit on petitions to confirm and the 90-day limit on petitions and responses requesting correction or vacating of awards. Subject to these limitations, a response must be filed within 10 days after the service of a petition (except in the case where a petition is served out-of-State, in which case the respondent has 30 days to file his response).

An appeal will lie from an order denying or dismissing a petition to compel arbitration, an order dismissing a petition for review of an award, an order confirming, vacating or correcting an award and a judgment upon an award.

There are, of course, many details in the statutes filling in this broad outline. These details are not mentioned here because they may be discovered by reading the proposed statute.

Respectfully submitted,

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Assistant Executive Secretary

#32 12/12/60

RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

Arbitration

The present California arbitration statute is Title 9 ([beginning] commencing with Section 1280) of Part 3 of the Code of Civil Procedure. The enactment of this statute in 1927 placed California among that small but growing group of states that have rejected the common law hostility to the enforcement of arbitration agreements and have provided a modern, expeditious [system] method of enforcing such agreements and awards made pursuant to them. [Nevertheless,] Experience under the California law has been generally satisfactory but has revealed certain defects in the statutory scheme. [Because of these defects, the Legislature directed] Accordingly, the Law Revision Commission requested and was given authority to study the arbitration statute to determine whether it should be revised.

In making this study the Commission has not only considered [not only] the California arbitration statute and the decisions interpreting it, but [it] has also considered the arbitration statutes and case law of other states and the Uniform Arbitration Act drafted by the National Conference of Commissioners on Uniform State Laws. The Commission has concluded that the basic principles of the present California arbitration statute should be retained. However, the Commission believes that some revision of the present law is necessary in order to improve the organization of the statute, to clarify the law of arbitration, to

eliminate certain anomalies and to improve arbitration procedure. Although there are certain desirable features of the Uniform Arbitration Act which should be incorporated in the California arbitration statute, much of the revision that is necessary would not be accomplished by the enactment of the Uniform Act. As the necessary revision of California arbitration law cannot be readily accomplished within the framework of the existing title on arbitration, the Commission recommends the enactment of a new title on arbitration that would retain the desirable principles of the existing law with the following principal modifications:

Matters Subject to Arbitration

1. The arbitration statute should be [~~made applicable~~] broadened to apply to agreements for appraisals and valuations. The distinction between "appraisal" and "arbitration" agreements was created by the courts at a time when the early statutory attempts to provide for enforcement of arbitration agreements imposed cumbersome procedural requirements upon the arbitration process. If it appeared from the nature of the agreement that the parties desired a determination of a particular fact -- such as the value of certain property -- and did not contemplate a formal proceeding in which evidence would be received, the courts held that the proceeding was an "appraisal" and not an "arbitration" in order to hold that the cumbersome statutory formalities were inapplicable. As neither the present California arbitration statute nor the statute recommended by the Commission requires the observance of [~~any particular formality~~] such formalities in the

conduct of an arbitration proceeding, there is no longer any reason to preserve the judicially created distinction between these types of proceedings. [~~Therefore, the distinction should be abolished.~~]

2. The arbitration statute should be made clearly applicable to collective bargaining agreements and other agreements pertaining to labor. The present law states that its provisions are not applicable to "contracts pertaining to labor." It has been held, however, that this exclusion does not apply to agreements providing for the performance of mental and artistic, rather than physical, tasks; thus, contracts providing for the performance of actors' or artists' services and contracts pertaining to professional services are not within the exclusion. It has also been held that this exclusion is not applicable to collective bargaining agreements. Thus, the exclusion has been so narrowly construed that there is no reported case in which it has been applied. The Commission believes that the arbitration statute should be clarified by omitting this exclusion and by providing specifically that agreements between employers and employees or their representatives are subject to the statute. This would codify the decisions interpreting the present arbitration statute. Of course such a provision would not require compulsory arbitration of labor disputes; it would merely provide a procedure for enforcing [~~the~~] such arbitration agreements [~~that~~] as parties voluntarily make [~~enter into~~]. Many of the matters involved in labor disputes that are determined by arbitration cannot be determined judicially. Hence, if agreements to arbitrate such matters were unenforceable, there would be no means to resolve many of such matters except through industrial strife.

3. [The arbitration statute should be made applicable to written agreements that have been extended or renewed by an oral or implied agreement of the parties.] At the present time, arbitration agreements are enforceable only if they are in writing. This requirement should be retained with the qualification that the statute also applies to a written agreement that has been extended or renewed by an oral or implied agreement of the parties. [Sometimes a written agreement containing] Thus, arbitration provisions contained in a written agreement will continue to be enforceable, even if the agreement expires, [and] if the parties [will] agree, either orally or by conduct, to continue to operate under the [former] agreement. [The Commission believes that any doubt as to the validity of the arbitration agreement under such circumstances should be removed.]

Proceedings to Enforce Arbitration Agreements

1. Arbitration agreements presently are and they should continue to be specifically enforceable through special statutory proceedings. However, the determinations to be made by the court upon a petition to compel arbitration should be clarified. Some recent cases have indicated that the court [should not only determine whether the parties agreed to arbitrate the matter in dispute but should also determine whether] may refuse to order arbitration if it finds that there is [any] no merit to the contentions of the [parties] petitioner. Such decisions permit the courts to resolve the very questions that the parties have agreed to submit to the decision of the arbitrators. The Commission recommends the addition of language to the arbitration statute [indicating] to

make it clear that upon proceedings to compel arbitration the court is not to consider the merits of the dispute sought to be arbitrated [upon-proceedings-to-compel-arbitration].

2. The arbitration statute should provide that there are matters that may be raised in defense to a petition to compel arbitration in addition to the lack of an arbitration agreement. The present statute provides that the court, upon a petition to compel arbitration, must determine whether the agreement to arbitrate exists and whether it has been breached; and, if there is no agreement or if there has been no breach of the agreement, the petition must be dismissed. Cases [,-however,] have held, however, that the courts may also consider whether the party seeking to compel arbitration has waived his right to [arbitrate] do so or whether any other grounds exist that render the contract unenforceable. These holdings should be codified. Moreover, the statute should not, as it presently does, provide for the dismissal of the petition if the arbitration agreement has not been breached. If there is an enforceable agreement to arbitrate, an order to arbitrate should be made even though there has been no breach of the agreement so that the parties will not have to return to the court if a party refuses to comply with the agreement at a later time.

3. Upon a petition to compel arbitration, the court should not be required to order the arbitration to proceed immediately if there is litigation between the parties pending before a court involving issues not subject to arbitration and a decision upon such issues may make the arbitration unnecessary. At the present time, the statute requires the court to order arbitration when it makes the requisite findings; there

is no statutory provision permitting the court to delay the arbitration until other matters have been judicially determined.

4. A pending action should not be stayed [~~in order to permit arbitration of the issues~~] because the matter in controversy is subject to arbitration unless the party seeking the stay has taken action to compel arbitration. Existing law provides for a stay of judicial proceedings merely upon a showing that the parties have agreed to arbitrate the matter involved. [~~to permit arbitration but does not require the party seeking such relief to take any steps to compel arbitration.--The~~] This permits the existence of an agreement to arbitrate [~~should not be~~] to be used [~~only~~] as [a] the basis for a dilatory plea. [~~; a pending action should be stayed only if the party seeking the stay is actively seeking to have the issues involved submitted to arbitration and a court of competent jurisdiction has determined that the issues should be arbitrated.~~]

5. A procedure should be set forth in the statute to guide the courts in the selection of an arbitrator when asked to do so. None is provided in the present law. A court should be required to select an arbitrator either from nominees jointly proposed by the parties or from lists of experienced arbitrators maintained by such agencies as the American Arbitration Association, The Federal Mediation Service or the California Conciliation Service.

Conduct of the Arbitration Proceeding

1. [~~The arbitration statute should require notice of the arbitration hearing to be given to all parties unless the parties have otherwise~~

agreed.] Although there is no requirement [of notice] in the present statute that notice of the arbitration hearing be given to all parties, the courts have stated that reasonable notice is required. The requirement of notice should be codified; but the uncertain requirement of "reasonable notice" should be replaced with a specific requirement of at least seven days notice unless the parties have otherwise agreed.

2. Recognition should be given to the fact that when there is more than one arbitrator, often only one arbitrator is, in fact, a neutral; each of the other members of the panel usually represents the viewpoint of the party who appointed him. The arbitrator appointed as a neutral should be given the [duties and responsibilities of] power and duty to send [ing] the required notices, administer [ing] oaths, issue [ing] subpenas, rule [ing] on evidence and procedure and preside [ing] at the hearing.

3. The neutral arbitrator should not be permitted to base his decision on information relating to the controversy other than that obtained at the hearing unless the parties consent or are given an opportunity to meet such information. This would change [Under] the existing law [,] which permits the arbitrators [may] to consult independent experts outside the hearing without notifying the parties so long as the ultimate decision is that of the arbitrators themselves.

4. Unless the parties have otherwise agreed, the arbitrators should be authorized to proceed with the arbitration and make an award if a court has ordered arbitration even though one of the parties, after receiving notice, has refused to appear and take part. The

present California law does not state whether or not the arbitration may proceed under such circumstances. [~~It should be made clear that~~] A party [~~may~~] should not be able to prevent arbitration merely by staying away from the hearing [~~. However, unless the parties have specifically agreed that the arbitrators may proceed in the absence of a party, the person seeking to proceed with the arbitration should first be required to obtain an order compelling the other to arbitrate. The person refusing to appear may believe that he has no duty to arbitrate. A~~] after there has been a judicial determination of his duty to arbitrate [~~should be made before an award may be taken against him in his absence~~].

5. [~~Similarly,~~] The neutral arbitrators should be able to make an award even though one or more of the arbitrators refuses to participate unless the parties have otherwise agreed. At the present time, if an arbitrator refuses to continue to participate in a proceeding, the hearing may continue and a majority of the arbitrators may decide the matter. However, the power of the majority to conduct the hearing when an arbitrator refuses to attend at all is doubtful, for the present California statute requires all of the arbitrators to meet. [~~The arbitration process should not be subject to the whims of a single arbitrator.~~] The Commission believes that the arbitration hearing should proceed even though an arbitrator refuses to participate; but the decision in such a situation should be made only by the neutral arbitrators so that the remaining arbitrators who are not neutral may not control the decision.

6. Persons should have the right to be represented by counsel at any stage of the arbitration proceedings. Therefore, the statute should provide that a waiver of the right to be represented by counsel at

arbitration proceedings [~~should~~] is not [~~be~~] binding. Such a provision is particularly desirable because the arbitration rules of some trade associations provide that the parties may not be represented by counsel [~~.~~] and when [~~If~~] an arbitration agreement incorporates these rules by reference, the parties may unwittingly waive their right to counsel when they merely believe that they are incorporating an arbitration procedure. [~~The Commission believes that persons should have the right to be represented by counsel at any stage of the arbitration proceedings, and the arbitration statute should guarantee that right.~~]

7. The arbitrators should [~~be granted~~] have a limited power to correct the award for technical errors. At present, only the court has the power to do so. Extending the power to the arbitrators may make it unnecessary for the parties to apply to the courts for relief in cases where the arbitrators have merely made an error in calculation or in form.

8. If the arbitration agreement does not provide a time limit within which the arbitrators must determine the dispute, the court should be able to fix a time within which the matter must be decided. The absence of such a provision in the present California law permits an arbitration proceeding to be delayed unnecessarily. A party may be prevented from obtaining any relief at all in such cases, for a court proceeding would be stayed until the arbitration is completed.

9. Statutory provision should be made for the pro rata division of the costs of arbitration among the parties. There is no provision in the existing law [~~determining~~] fixing the responsibility of the parties for such costs. If there is no agreement between the parties on the matter, the costs should be borne equally by all the parties [~~.~~] , as this is the usual practice.

Enforcement of the Award

1. The present 90-day limit for attacking the award by a petition to vacate or correct should be retained. The parties are entitled to know promptly whether or not the award is to be attacked. However, the present 90-day period within which an award may be confirmed by the court should be extended to four years. The confirmation procedure is merely a [~~procedure for~~] method of expeditiously enforc[~~ement~~]ing [~~of~~] an arbitration award [~~,~~] and should be available when there is a refusal to comply with the award even though this occurs long after the award is made. [~~hence the time for seeking such enforcement action should be the same as~~] However, the general principle of limitations of actions requires that there be some limit on the time for confirming an award and four years, the time within which relief must be sought for breach of a written contract, seems appropriate. [~~Parties usually do not resort to confirmation unless it appears that the opposing party is not going to comply with the award. Therefore, the extended period for confirmation will permit the parties to utilize the expeditious enforcement procedures provided even though the refusal to comply with the award occurs long after the award was made. The present 90-day limit for attacking the award by a petition to vacate, modify or correct should be retained. The parties are entitled to know promptly whether or not the award is to be attacked, and the shorter time limit within which a party may attack the award will place the burden of taking action upon the person claiming the award is defective.~~]

2. It should be made clear that an award becomes part of the contract between the parties and may be enforced as such even though it is not

confirmed and a judgment is not entered in conformity with it. The present California statute does not indicate the legal status of an unconfirmed award. Although no California case has specifically so held, there have been indications in some cases that an unconfirmed award probably would be enforced as a contract between the parties. If unconfirmed awards became void upon expiration of the time for confirmation, the parties would be forced to initiate judicial proceedings to confirm every award made. Thus a great deal of unnecessary and undesired litigation would be generated. Therefore, any doubt concerning the validity of unconfirmed awards should be eliminated by specific language in the arbitration statute stating that unconfirmed awards are enforceable as contracts.

3. The arbitration statute should set forth the pleading procedure to be followed when a petition to confirm, [~~modify~~] correct or vacate an award is opposed. The present law does not indicate what [~~procedure is to be followed~~] pleading is appropriate in such cases, and as a result the parties to these proceedings cannot determine whether an opposing pleading is necessary or permitted [~~, and cannot determine~~] or what form of opposing pleading to use. A person opposing a petition to confirm, [~~modify~~] correct or vacate an award should be required to file a response setting forth his contentions and requesting any relief he believes that he is entitled to receive.

4. The arbitration statute should require the presentation of all issues relating to the validity of an award to the court at the same time in a proceeding that results in either the confirmation of the award (as made or as [~~modified~~] corrected by the court) or the vacation of the award.

Any time a petition to confirm, [~~modify~~] correct or vacate an award is contested, the court is called upon to determine the validity of the award. [~~If~~] When it makes such a determination, it should finally settle the status of the award so that it will be unnecessary for the parties to return to the court at a later time for another determination of the status of the award.

5. If the court vacates an award, it should have the power to order a rehearing by arbitrators; but unless the parties otherwise agree, the rehearing should be conducted by different arbitrators, for the original arbitrators may be unduly disposed to decide the matter in the same manner that it was decided at the first hearing. The present statute grants the court the power to order a rehearing, but only if the time originally fixed in the arbitration agreement for the arbitrators' decision has not expired. This limitation precludes a rehearing in a great many cases. [~~The rehearing procedure can be more effectively utilized if the time within which the award is to be made under the arbitration~~] The statute should be revised to permit the award on rehearing to be made within the same period of time as that specified in the agreement [~~is~~] computed from the date of the order for rehearing [~~and not from the date of the original agreement~~].

6. A written award made pursuant to an oral arbitration agreement should be subject to confirmation [~~or attack~~] , correction or vacation under the arbitration statute. At present, oral arbitration agreements are not specifically enforceable, but an award made pursuant to such an agreement is enforceable as a contract. There is, however, no provision in the arbitration statute for enforcing or attacking an award made pursuant to [~~such~~] an oral agreement [~~under the arbitration statute~~]. The Commission

does not recommend a change in the policy of refusing specific enforcement of oral arbitration agreements. But there is no reason to deny the parties to such an agreement the right to utilize the summary procedures available under the arbitration statute after [an] a written award has been made.

Judicial Proceedings Generally

1. For the purpose of judicial proceedings arising out of an arbitration agreement, California courts should [be given] have personal jurisdiction over a person [parties] who [have] enters [ed] into such an agreement[s] in this State providing for arbitration in California whether or not such [parties] person can be found within the State when judicial relief is sought. At the present time, an arbitration agreement entered into in California [usually] probably cannot be enforced here against an out-of-state party unless personal jurisdiction can be obtained. The Commission therefore recommends that the making of an agreement in this State which provides for arbitration in this State be deemed a consent to California's jurisdiction for purposes of [enforcement of] judicial proceedings relating to the arbitration agreement. A similar provision is contained in the Uniform Arbitration Act and the laws of some other states.

2. The venue provisions of the present arbitration statute, which are scattered throughout the title on arbitration, should be clarified and [gathered] brought together. [in one chapter of the title on arbitration. The venue provisions of the present arbitration statute are scattered throughout the title on arbitration.] They [are incomplete in that they do not] should also be revised to permit California courts to confirm an

award even if portions of the arbitration proceeding were conducted in several counties or outside the State. The benefits of the arbitration statute should not be denied to the parties to an arbitration agreement merely because circumstances require that evidence be received in more than one locality or that the controversy be submitted to persons not all of whom are within the State.

3. The appeal provisions of the arbitration statute should also be clarified. The present statute does not provide for an appeal from an order made prior to the arbitration hearing. But the cases hold that an order dismissing a petition to compel arbitration is appealable and an order granting a petition to compel arbitration is not appealable. These decisions should be codified. ~~[so that the appeal provisions of the arbitration statute completely cover the matter of appeals in arbitration proceedings.]~~

Elimination of Obsolete Provisions

There are certain provisions in the codes that are inconsistent with the provisions of the title on arbitration as proposed[.]:

Section 1053 of the Code of Civil Procedure provides in part that when there are three arbitrators all must meet but two of them may perform any act that all of them might perform. As the proposed title on arbitration contains provisions determining the circumstances under which arbitration may proceed in the absence of some of the arbitrators, the reference in Section 1053 to arbitrators should be deleted.

Civil Code Section 1730 (Section 10 of the Uniform Sales Act) states that a contract to sell at a valuation is avoided if the valuation fails

without fault of either party. As there is no reason for such an agreement to fail if the parties can proceed under the title on arbitration, this section should be amended to indicate that it is inapplicable to those cases covered by the arbitration statute.

Subdivision 3 of Civil Code Section 3390 states that an agreement to submit a dispute to arbitration is not specifically enforceable. As the arbitration statute provides a procedure for specifically enforcing [~~such an~~] a written arbitration agreement, this subdivision should be [~~deleted from the section.~~] revised so that it applies only to oral agreements.

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to repeal Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure, to add Title 9 (commencing 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, relating to arbitration.

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

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

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

Title 9

ARBITRATION

Chapter 1

GENERAL PROVISIONS

1280. As used in this title:

(a) "Agreement" includes [,] but is not limited to [,] agreements providing for valuations, appraisals and similar proceedings and agreements between employers and employees or between their respective representatives.

(b) "Award" includes but is not limited to an award made pursuant to an agreement not in writing.

(c) "Controversy" [~~includes~~] means any question arising between the parties to an agreement whether such question is one of law or of fact or both.

(d) "Neutral arbitrator" means an arbitrator who is (1) selected jointly by the parties to an agreement to arbitrate or by their representatives or (2) appointed by the court when the parties or their representatives [~~jointly~~] fail to [~~do so.~~] select an arbitrator who was to be selected jointly by them.

(e) "Written agreement" shall be deemed to include a written agreement which has been extended or renewed by an oral or implied agreement.

1280.2. Whenever reference is made in this title to any portion of the title or of any other law of this State, the reference applies to all amendments and additions thereto now or hereafter made.

Chapter 2

ENFORCEMENT OF ARBITRATION AGREEMENTS

[~~1280.2.~~] 1281. A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.

1281.2. On petition of a party alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the parties to arbitrate the [~~arbitration of such~~] controversy if it determines that an agreement to arbitrate [~~such~~] the controversy exists, unless it determines that:

(a) The right to [~~arbitrate~~] compel arbitration has been waived by the petitioner; or

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

If the court determines that a[n] written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the [~~matter in issue~~] petitioner's contentions lack[s] substantive merit.

If the court determines that there are other issues[~~,~~] between the parties which are not subject to arbitration[~~,~~] and which [~~that~~] are the subject of a pending action or special proceeding between the parties and that a determination of such issues may make the arbitration unnecessary, the court may [~~order arbitration but stay~~] delay its order to arbitrate until [~~such~~] the determination of such other issues or until such earlier time as the court specifies.

[~~1281.3.~~] 1281.4. If a court of competent jurisdiction, whether in this State or not, has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court [~~of this State~~] in which such action or proceeding is pending

shall, upon motion of a party, stay such action or proceeding until an arbitration is had in accordance with the order [~~for arbitration~~] to arbitrate or until such earlier time as the court specifies.

If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order [~~compelling arbitration of~~] to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court [~~of this State~~] in which such action or proceeding is pending shall, upon motion of a party, stay such action or proceeding until the application for an order [~~compelling arbitration~~] to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order [~~for arbitration~~] to arbitrate or until such earlier time as the court specifies.

If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only.

[~~1281.4.~~] 1281.6. If the arbitration agreement provides or the parties otherwise 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 to act and his successor has not been appointed, the court, on petition of a party, shall appoint [~~one or more~~] the arbitrator[s].

When a petition is made to the court 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 private disinterested association concerned with arbitration. The parties may within five days of receipt of <u>notice of</u> such nominees from the court jointly select the arbitrator whether or not such arbitrator is among the nominees. If the parties fail to select an arbitrator within the five-day period, the court shall appoint the arbitrator from the nominees.

Chapter 3

CONDUCT OF ARBITRATION PROCEEDINGS

1282. Unless the parties otherwise agree:

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

(b) ~~[Except as otherwise provided in subdivision (c) of Section 1282.2,]~~ If there is more than one arbitrator, the powers and duties of the arbitrators, other than the powers and duties of a neutral arbitrator, may be exercised by a majority of them if reasonable notice of all proceedings has been given to all arbitrators.

(c) If there is more than one neutral arbitrator[~~,~~]:

<u>(1)</u> The powers and duties of a neutral arbitrator [~~under Sections 1282.8, 1283, 1283.2 and 1283.8, subdivisions (a) and (b) of Section 1282.2 and subdivision (d) of Section 1284.2~~]

may be exercised by a majority of the neutral arbitrators. [~~or,~~]

(2) By unanimous agreement of the neutral arbitrators, such powers and duties may be delegated to one of their number[~~,~~] but the power to make or correct the award may not be so delegated.

(d) If there is no neutral arbitrator, the powers and duties of a neutral arbitrator may be exercised by a majority of the arbitrators.

1282.2. Unless the parties otherwise agree:

(a) The neutral arbitrator shall appoint a time and place for the hearing and cause notice thereof [~~to the parties and to the other arbitrators~~] to be served personally or by registered or certified mail on the parties and the other arbitrators not less than seven days before the hearing. Appearance at the hearing waives the right to notice.

(b) The neutral arbitrator may adjourn the hearing from time to time as necessary. On request of a party for good cause, or upon his own determination, the neutral arbitrator 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.

[~~(b)~~] (c) The neutral arbitrator shall preside at the hearing, shall 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.

[~~(c)~~] (d) 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. On request of any party, the testimony of witnesses shall be given under oath.

[~~(d)~~] (e) If [~~an order to arbitrate has been made pursuant to Section 1281,~~] a court has ordered arbitration of the controversy, the arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear.

[~~(e)~~] (f) If an arbitrator for any reason fails to act, the hearing shall continue but only the remaining neutral arbitrator or neutral arbitrators may make the award.

[~~(f)~~] (g) If a neutral arbitrator intends to base an award upon information [~~relating to the controversy other than that~~] not obtained at the hearing, he shall disclose such information to all parties to the arbitration and give the parties an opportunity to meet it.

1282.6. A party has the right to be represented by an attorney at any proceeding or hearing under this title. [~~and~~] A waiver of this right may be revoked; but if a party revokes [~~his~~] such waiver [~~of his right to be represented by an attorney~~], the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.

1282.8. 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. Subpenas shall be served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code.

1283. The neutral arbitrator may administer oaths.

1283.2. 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 for use as evidence and not for discovery. The deposition shall be taken in the manner prescribed by law for the taking of depositions in civil actions. If the neutral arbitrator orders the taking of the deposition of a witness who resides outside the State, the party who applied for the taking of the deposition shall obtain a commission therefor from the superior court in accordance with Sections 2024 to 2028, inclusive, of this code.

1283.4. Except for the parties and their agents, officers and employees, all witnesses appearing pursuant to subpena are entitled to receive fees and mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in the superior court. The fee and mileage

of a witness subpenaed upon the application of a party shall be paid by [~~the~~] such party [~~at whose request the witness is subpenaed~~]. The fee and mileage of a witness subpenaed solely upon the determination of the neutral arbitrator shall be paid [~~for~~] in the manner provided for the payment of the neutral arbitrator's expenses.

1283.6. The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators the decision of which is necessary [~~to the award made~~] in order to determine the controversy.

1283.8. The neutral arbitrator shall serve a signed copy of the award on each party personally or by registered or certified mail or as provided in the agreement.

1284. 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 petition of a party. The parties may extend the time either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he gives the arbitrators written notice of his objection prior to the service of a signed copy of the award on him.

1284.2. [~~(a)~~] The arbitrators, upon written application of a party, may [~~modify or~~] correct the award upon any of the

grounds set forth in subdivisions (a) and (c) of Section 1285.8 not later than 30 days after service of a signed copy of the award on the applicant.

[~~(b)~~] Application for such [~~modification or~~] correction shall be made not later than 10 days after service of a signed copy of the award on the applicant. Upon or before making such application, the applicant shall deliver or mail a copy of the application to all of the other parties to the arbitration.

[~~(c)~~] Any party to the arbitration may make written objection to such application. The objection shall be made not later than 10 days after the application is delivered or mailed to the objector. Upon or before making such objection, the objector shall deliver or mail a copy of the objection to the applicant and all the other parties to the arbitration.

[~~(d)~~] The arbitrators shall either deny the application or [~~modify or~~] correct the award. The denial of the application or the [~~modification or~~] correction of the award shall be in writing and signed by the arbitrators concurring therein, and the neutral arbitrator shall serve a signed copy of such denial or [~~modification or~~] correction on each party personally or by registered or certified mail or as provided in the agreement. If no denial of the application or [~~modification or~~] correction of the award is served within the 30-day period provided in [~~subdivision (a) of~~] this section, the application for [~~modification or~~] correction shall be deemed denied on the

last day thereof. [~~of the 30-day period.~~]

1284.4. Unless [~~otherwise agreed to by~~] the parties otherwise agree, each party shall pay his pro rata share of the expenses and fees of the neutral arbitrator, 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~~] a party for his own benefit.

CHAPTER 4

ENFORCEMENT OF THE AWARD

Article 1

Confirmation, Correction or Vacation of the Award

1285. Any party to an arbitration proceeding in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration proceeding and may name as respondents any other persons bound by the arbitration award.

1285.2. A response to a petition under this chapter may request the court to dismiss the petition or to confirm, correct or vacate the award.

1285.4. Unless a copy thereof has previously been filed in the proceeding, a petition or response under this chapter shall:

(a) Allege the substance of or have attached a copy of the agreement to arbitrate unless the existence of such an agreement is denied.

(b) Set forth the names of the arbitrators.

(c) Incorporate or have attached a copy of the award and the written opinion of the arbitrators, if any.

1285.6. If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made unless in accordance with this chapter it corrects the award and confirms it as corrected or vacates the award or dismisses the proceeding.

1285.8. If a petition or response requesting that an award be corrected is duly served and filed, the court shall correct the award and confirm it as corrected if the court determines that:

(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 controversy submitted; or

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

1286. If a petition or response requesting that an award be vacated is duly served and filed, the court shall vacate the award if the court determines that:

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

(b) There was corruption in any of the arbitrators;

(c) The rights of the party requesting that the award be vacated were substantially prejudiced by misconduct of a neutral arbitrator;

(d) The arbitrators exceeded their powers, but instead of vacating the award on this ground the court shall correct and confirm the award as corrected if it can do so without affecting the merits of the decision upon the controversy submitted; or

(e) The rights of the party requesting that the award be vacated were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the

controversy or by other conduct of the arbitrators contrary to the provisions of this title.

1286.2. If the award is vacated, the court may order a rehearing before new arbitrators. If the award is vacated on the grounds set forth in subdivision (d) or (e) of Section 1286, the court with the consent of the parties may order a rehearing before the original arbitrators.

If the arbitration agreement requires that the award be made within a specified period of time, the rehearing may be held and the award made within an equal period of time beginning with the date of the order for rehearing unless the court determines that the purpose of the time limit agreed upon by the parties will be frustrated by the application of this provision.

1286.4. The court shall dismiss a petition under this chapter as to any person named as a respondent if such person was neither a party to the arbitration proceedings nor a person bound by the award.

1286.6. The court shall dismiss a proceeding under this chapter if the provisions of the award are not lawful within the meaning of Section 1667 of the Civil Code.

1286.8. If an award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action; and it may be enforced like any other judgment of the court in which it is entered.

1287. An award that has neither been confirmed nor vacated shall be deemed to be, and has the same force and effect as, a contract between the parties to the arbitration proceeding.

Article 2

Limitations of Time

1288. A petition requesting that an award be confirmed shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition requesting that an award be vacated or that an award be corrected shall be served and filed not later than 90 days after the date of the service of a signed copy of the award on the petitioner.

1288.2. A response requesting that an award be vacated or that an award be corrected shall be served and filed not later than 90 days after the date of service of a signed copy of the award upon the respondent or his representative.

1288.4. The time limits provided in Sections 1288 and 1288.2 may be extended by an agreement in writing between the parties.

1288.6. No petition may be served and filed under this chapter until at least 10 days after service of the signed copy of the award upon the petitioner.

1288.8. If an application is made to the arbitrators for correction of the award, a petition may not be served and filed under this chapter until the determination of that application.

1289. If an application is made to the arbitrators for correction of the award, the date of the service of the award for the purposes of Sections 1288 and 1288.2 shall be deemed to be whichever of the following dates is the earlier:

(a) The date of service upon the petitioner of a signed copy

of the correction of the award or of the denial of the application.

(b) The date that such application is deemed to be denied under Section 1284.2.

CHAPTER 5

GENERAL PROVISIONS RELATING TO JUDICIAL PROCEEDINGS

Article 1

Petitions and Responses

1290. A proceeding under this title in the courts of this State is commenced by the filing of a petition. Any person named as a respondent in a petition may file a response thereto. The allegations of a petition are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed. The allegations of a response are deemed controverted.

1290.2. A petition under this title shall be heard in the manner and upon the notice provided by law for the making and hearing of motions, except that not less than 10 days notice of the date set for the hearing on the petition shall be given.

1290.4. (a) A copy of the petition and a written notice of the time and place of the hearing thereof and any other papers upon which the petition is based shall be served in the manner provided in the arbitration agreement for the service of such petition and notice.

(b) If the arbitration agreement does not provide the manner in

which such service shall be made and the person upon whom service is to be made has not previously appeared in the proceeding and has not previously been served in accordance with this subdivision:

(1) Service within this State shall be made in the manner provided by law for the service of summons in an action.

(2) Service outside this State shall be made by mailing the copy of the petition and notice and other papers by registered or certified mail. Personal service is the equivalent of such service by mail. Proof of service by mail shall be made by affidavit showing such mailing together with the return receipt of the United States Post Office bearing the signature of the person on whom service was made. Notwithstanding any other provision of this title, if service is made in the manner provided in this paragraph, the petition may not be heard until at least 30 days after the date of such service.

(c) If the arbitration agreement does not provide the manner in which such service shall be made and the person on whom service is to be made has previously appeared in the proceeding or has previously been served in accordance with subdivision (b) of this section, service shall be made in the manner provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code.

1290.6. A response shall be served and filed within 10 days after service of the petition except that if the petition is served in the manner provided in paragraph (2) of subdivision (b) of Section 1290.4, the response shall be served and filed within 30 days after service of the petition. The time for serving and filing a response may be extended by an agreement in writing between the

parties or, for good cause, by order of the court.

1290.8. A response shall be served as provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code.

1291. Findings of fact and conclusions of law need not be made by the court upon the determination of a petition under this title.

Article 2

Venue, Jurisdiction and Costs

1292. Except as otherwise provided in this article, any petition made prior to the commencement of arbitration proceedings shall be filed in the superior court in:

(a) The county where the agreement is to be performed or was entered into.

(b) If the agreement does not specify a county where the agreement is to be performed and the agreement was not entered into in any county in this State, the county where any party resides or has a place of business.

(c) In any case not covered by subdivision (a) or (b) of this Section, in any county in this State.

1292.2. Except as otherwise provided in this article, any petition made after the commencement or completion of arbitration proceedings shall be filed in the superior court in the county where the arbitration is being or has been held, or, if not held exclusively in any one county of this State, then such petition shall be filed as provided in Section 1292.

1292.4. If a controversy referrable to arbitration under an alleged agreement is involved in an action or proceeding pending in a superior court, a petition for an order to arbitrate shall be filed in such action or proceeding.

1292.6. After a petition has been filed under Section 1281.2, 1281.6 or 1284, any subsequent petition under those sections involving the same agreement to arbitrate and the same controversy and the same parties shall be filed in the same court and heard in and as a part of the earlier proceeding.

1292.8. After a petition has been filed under Chapter 4 (commencing with Section 1285) of this title, any subsequent petition under such chapter involving the same award and the same parties shall be filed in the same court and heard as a part of the earlier proceedings.

1293. A motion for a stay of an action made pursuant to Section 1281.4 shall be made in the court where the action is pending.

1293.2. The making of an agreement in this State providing for arbitration to be had within this State shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such agreement by the making of any orders provided for in this title and by entering of judgment on an award under the agreement. An agreement made in this State which does not specify a place for the arbitration to be held shall be deemed to provide for arbitration within this State.

1293.4. The court shall award costs upon any judicial proceeding under this title as provided in Chapter 6 (commencing with Section 1021) of Title 14 of Part 2 of this code.

Article 3

Appeals

1294. An appeal may be taken from:

(a) An order dismissing or denying a petition to compel arbitration.

(b) An order dismissing a petition under Chapter 4 (commencing with Section 1285)of this title.

(d) An order confirming an award.

(e) An order correcting and confirming an award as corrected.

(f) An order vacating an award unless a rehearing in arbitration is ordered.

(g) A judgment entered pursuant to this title.

1294.2. The appeal shall be taken in the same manner as an appeal from an order or judgment 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.~~] except as otherwise provided in Title 9 (commencing 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 does 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 oral 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. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or

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

SEC. 6. This act applies to all contracts whether executed before or after the effective date of this act except that Section 1293.2 of the Code of Civil Procedure, as added by this act, does not apply to any contract executed before the effective date of this act but Section 1293.2 does apply to any renewal or extension of an existing contract on or after the effective date of this act.