

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION AND STUDY

*relating to*

**Arbitration**

December 1960

## LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN  
*Governor of California*  
*and to the Members of the Legislature*

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the Arbitration Statute should be revised. The Commission submits herewith its recommendation relating to this subject and the study prepared by its research consultant, Mr. Sam Kagel, a member of the California State Bar and Professor of Law, University of California at Berkeley.

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December 1960



## TABLE OF CONTENTS

|  | Page |
|--|------|
| RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION -----           | G- 5 |
| A STUDY RELATING TO ARBITRATION -----                                    | G-25 |
| INTRODUCTION -----   | G-25 |
| NATURE OF ARBITRATION -----  | G-27 |
| HISTORICAL BACKGROUND -----  | G-27 |
| Common Law -----   | G-27 |
| Legislation on Arbitration -----   | G-27 |
| California Legislation -----   | G-28 |
| DISPLACEMENT OF COMMON LAW ARBITRATION BY STATUTORY<br>ARBITRATION ----- | G-29 |
| Present Status of Common Law Arbitration in California --                | G-29 |
| Oral Agreements To Arbitrate -----                                       | G-30 |
| MATTERS SUBJECT TO ARBITRATION -----                                     | G-30 |
| Present and Future Disputes -----  | G-30 |
| Non-justiciable Questions -----  | G-30 |
| Questions of Law -----   | G-31 |
| Labor-Management Agreements To Arbitrate -----                           | G-32 |
| Appraisals and Valuations -----  | G-34 |
| ENFORCEMENT OF ARBITRATION AGREEMENTS -----                              | G-35 |
| Petition To Compel Arbitration -----                                     | G-36 |
| Waiver of Right To Arbitrate -----                                       | G-36 |
| Determination of Merits of Controversy -----                             | G-37 |
| Right to Jury Trial -----  | G-38 |
| Stay of Judicial Proceedings -----                                       | G-39 |
| Stay of Arbitration -----  | G-39 |
| Appointment of Arbitrator by the Court -----                             | G-40 |
| THE ARBITRATION PROCEEDINGS -----  | G-40 |
| The Arbitrators -----  | G-41 |
| Qualifications of the Arbitrators -----                                  | G-41 |
| Neutral and Party Arbitrators -----                                      | G-42 |
| Failure of Arbitrator To Act -----                                       | G-42 |
| The Hearing -----  | G-43 |
| Notice of Hearing -----  | G-43 |
| Ex Parte Investigations -----  | G-44 |
| The Oath -----   | G-45 |
| Representation by Counsel -----  | G-46 |
| Presentation of Evidence -----   | G-46 |
| Witnesses, Depositions and Subpoenas -----                               | G-47 |
| Making the Award -----   | G-49 |
| Default Awards -----   | G-50 |
| Modification or Correction of Award by Arbitrator -----                  | G-51 |
| Costs -----  | G-52 |

## TABLE OF CONTENTS—Continued

|   | Page |
|---|------|
| POST-AWARD JUDICIAL PROCEEDINGS -----                 | G-53 |
| Judicial Review of the Award -----                    | G-53 |
| Grounds for Modification or Correction of Award ----- | G-54 |
| Grounds for Vacating the Award -----                  | G-54 |
| Procedural Aspects of Motions on the Award -----      | G-57 |
| Time Limits -----                                     | G-58 |
| Notice to Parties -----                               | G-58 |
| Requirement for Attachment of Certain Papers -----    | G-59 |
| Rehearing by Arbitrators -----                        | G-59 |
| Judgment -----  | G-59 |
| JUDICIAL REVIEW BY APPELLATE COURT -----              | G-59 |
| JURISDICTION, VENUE AND COSTS -----                   | G-60 |
| Jurisdiction -----                                    | G-60 |
| Venue -----   | G-61 |
| Costs -----   | G-62 |
| SUMMARY -----   | G-63 |

# RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

## Relating to Arbitration

The present California arbitration statute is Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. The enactment of this statute in 1927 placed California among the 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 method of enforcing such agreements and awards made pursuant to them. Experience under the California law has been generally satisfactory but has revealed certain defects in the statutory scheme. 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 the California arbitration statute and the decisions interpreting it, but 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 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 found that the proceeding was an "appraisal" and not an "arbitration" in order to hold that the cumbersome statutory formalities were

inapplicable. Since neither the present California arbitration statute nor the statute recommended by the Commission requires the observance of such formalities in the conduct of an arbitration proceeding, there is no longer any reason to preserve the judicially created distinction between these proceedings.

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 such arbitration agreements as parties voluntarily make. 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. 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. Thus, arbitration provisions contained in a written agreement will continue to be enforceable even if the agreement expires if the parties agree, either orally or by conduct, to continue to operate under the agreement.

#### **Proceedings To Enforce Arbitration Agreements**

1. Arbitration agreements presently are and they should continue to be specifically enforceable through special statutory proceedings. However, the nature and scope of 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 may refuse to order arbitration if it finds that there is no merit to the contentions of the 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 to make clear that upon proceedings to compel arbitration the court is not to consider the merits of the dispute sought to be arbitrated.

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 agreement to arbitrate. 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 have held, however, that the courts may also consider whether the party seeking to compel arbitration has waived his right to 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 because the matter in controversy is subject to arbitration unless the party seeking the stay has taken or is taking 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. This permits the existence of an agreement to arbitrate to be used as the basis for a dilatory plea.

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 agencies concerned with arbitration such as the American Arbitration Association, the Federal Mediation and Conciliation Service or the California State Conciliation Service.

#### **Conduct of Arbitration Proceedings**

1. Although there is no requirement 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 power and duty to send the required notices, administer oaths, issue subpoenas, rule on evidence and procedure and preside 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 the existing law which permits the arbitrators 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 the arbitration may proceed under such circumstances. A party should not be able to prevent arbitration merely by staying away from the hearing after there has been a judicial determination of his duty to arbitrate.

5. 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 Commission believes that the arbitration 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 may be revoked. Such a provision is particularly desirable because the arbitration rules of some trade associations provide that the parties waive their right to be represented by counsel, and when 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.

7. The arbitrators should 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 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 period within which an award may be confirmed by the court should be extended to four years. The confirmation procedure is merely a method of expeditiously enforcing an arbitration award and should be available when there is a refusal to comply with the award even though this may occur long after the award is made. However, the general principle of limitation 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.

2. A petition to correct or vacate an award should be filed within 100 days from the date of the service of the award on the petitioner. The parties are entitled to know promptly whether or not the award is to be attacked. Such a petition is now required to be filed within 90 days. The 100-day period is easier to compute accurately than the 90-day period which is often thought of as a three-month period.

3. It should be made clear that an award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties. 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.

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 by providing that whenever a petition relating to an award is filed the court must confirm the award as made unless it corrects and confirms the award, vacates the award or dismisses the proceeding. When a court entertains any proceeding relating to an award, 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 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 computed from the date of the order for rehearing if the court determines that the purpose of the original time limit would not be frustrated by such an extension.

6. A written award made pursuant to an oral arbitration agreement should be subject to confirmation, 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 an oral agreement. 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 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 have personal jurisdiction over a person who enters into such an agreement in this State providing for arbitration in California whether or not such person can be found within the State when judicial relief is sought. At the present time, an arbitration agreement entered into in California 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 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 arbitration statute should set forth the pleading procedure to be followed in judicial proceedings arising out of an arbitration agreement. These proceedings should be initiated by filing a petition; a person opposing a petition should be permitted to file a response. The present law does not indicate what 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 or what form of opposing pleading to use.

3. The venue provisions of the present arbitration statute, which are scattered throughout the title on arbitration, should be clarified and brought together. They 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.

4. 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. 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.

#### 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 a contract to fail if the parties can proceed under the arbitration statute, this section should be amended to recognize that in some cases the arbitration statute will prevent the contract from failing.

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 arbitration agreements, this subdivision should be deleted from the section.

Sections 1647.5 and 1700.45 of the Labor Code contain references to statutory provisions that will be repealed by the proposed legislation. These sections should be amended to delete these references and to indicate the relationship of the sections to the new arbitration statute.

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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, and to add Title 9 (commencing with Section 1280) to Part 3 of, and to amend Section 1053 of, the Code of Civil Procedure, and to amend Sections 1730 and 3390 of the Civil Code and Sections 1647.5 and 1700.45 of the Labor 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:

\* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted.

## 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" means any question arising between 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 or by the arbitrators selected by the parties or (2) appointed by the court when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them.

(e) "Party to the arbitration" means a party to the arbitration agreement:

(1) Who seeks to arbitrate a controversy pursuant to the agreement;  
 (2) Against whom such arbitration is sought pursuant to the agreement; or

(3) Who is made a party to such arbitration by order of the neutral arbitrator upon such party's application, upon the application of any other party to the arbitration or upon the neutral arbitrator's own determination.

(f) "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

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

1281.2. On petition of a party to an arbitration agreement 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 petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

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

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

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

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

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 in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order 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 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 in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order 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.

1281.6. If the arbitration agreement provides a method of appointing an arbitrator, such method shall be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method shall be followed. In the absence of an agreed method, 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 to the arbitration agreement, shall appoint the arbitrator.

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 to the arbitration or obtained from a governmental agency concerned with arbitration or private disinterested association concerned with arbitration. The parties to the agreement who seek arbitration and against whom arbitration is sought may within five days of receipt of notice of such nominees from the court jointly select the arbitrator whether or not such arbitrator is among the nominees. If such 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 arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide by an agreement which is not contrary to the arbitration agreement as made or as modified by all of the parties thereto:

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

(b) 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 :

(1) The powers and duties of a neutral arbitrator may be exercised by a majority of the neutral arbitrators.

(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 arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide by an agreement which is not contrary to the arbitration agreement as made or as modified by all the parties thereto :

(a) The neutral arbitrator shall appoint a time and place for the hearing and cause notice thereof to be served personally or by registered or certified mail on the parties to the arbitration and on 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 to the arbitration 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 to the arbitration consent thereto.

(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.

(d) The parties to the arbitration 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 to the arbitration, the testimony of witnesses shall be given under oath.

(e) If a court has ordered a person to arbitrate a controversy, the arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party ordered to arbitrate, who has been duly notified, to appear.

(f) If an arbitrator, who has been duly notified, for any reason fails to participate in the arbitration, the arbitration shall continue but only the remaining neutral arbitrator or neutral arbitrators may make the award.

(g) If a neutral arbitrator intends to base an award upon information 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.

1282.4. A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title. A waiver of this right may be revoked; but if a party revokes

such waiver, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.

1282.6. Upon application of a party to the arbitration or upon his own determination, the neutral arbitrator may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents and other evidence. Subpoenas shall be served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code.

1282.8. The neutral arbitrator may administer oaths.

1283. On application of a party to the arbitration the neutral arbitrator may order the deposition of a witness to be taken for use as evidence and not for discovery if the witness cannot be compelled to attend the hearing or if such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow the deposition to be taken. 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.

1283.2. Except for the parties to the arbitration and their agents, officers and employees, all witnesses appearing pursuant to subpoena 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 subpoenaed upon the application of a party to the arbitration shall be paid by such party. The fee and mileage of a witness subpoenaed solely upon the determination of the neutral arbitrator shall be paid in the manner provided for the payment of the neutral arbitrator's expenses.

1283.4. 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 in order to determine the controversy.

1283.6. The neutral arbitrator shall serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail or as provided in the agreement.

1283.8. 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 to the arbitration. The parties to the arbitration may extend the time either before or after the expiration thereof. A party to the arbitration 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. The arbitrators, upon written application of a party to the arbitration, may correct the award upon any of the grounds set forth in subdivisions (a) and (c) of Section 1286.6 not later than 30 days after service of a signed copy of the award on the applicant.



Application for such 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.

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.

The arbitrators shall either deny the application or correct the award. The denial of the application or the 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 correction on each party to the arbitration personally or by registered or certified mail or as provided in the agreement. If no denial of the application or correction of the award is served within the 30-day period provided in this section, the application for correction shall be deemed denied on the last day thereof.

1284.2. Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by 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 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 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. A petition under this chapter shall:

(a) Set forth the substance of or have attached a copy of the agreement to arbitrate unless the petitioner denies the existence of such an agreement.

(b) Set forth the names of the arbitrators.

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

1285.6. Unless a copy thereof is set forth in or attached to the petition, a response to a petition under this chapter shall:

(a) Set forth the substance of or have attached a copy of the agreement to arbitrate unless the respondent denies the existence of such an agreement.

(b) Set forth the names of the arbitrators.

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

1285.8. A petition to correct or vacate an award, or a response requesting such relief, shall set forth the grounds on which the request for such relief is based.

1286. 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, vacates the award or dismisses the proceeding.

1286.2. Subject to Section 1286.4, 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 such party were substantially prejudiced by misconduct of a neutral arbitrator;

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or

(e) The rights of such party 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.

1286.4. The court may not vacate an award unless:

(a) A petition or response requesting that the award be vacated has been duly served and filed; or

(b) A petition or response requesting that the award be corrected has been duly served and filed and:

(1) All petitioners and respondents are before the court; or

(2) All petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to vacate the award or that the court on its own motion has determined to vacate the award and all petitioners and respondents have been given an opportunity to show why the award should not be vacated.

1286.6. Subject to Section 1286.8, the court, unless it vacates the award pursuant to Section 1286.2, 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 exceeded their powers but 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.

1286.8. The court may not correct an award unless:

(a) A petition or response requesting that the award be corrected has been duly served and filed; or

(b) A petition or response requesting that the award be vacated has been duly served and filed and:

(1) All petitioners and respondents are before the court; or

(2) All petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to correct the

award or that the court on its own motion has determined to correct the award and all petitioners and respondents have been given an opportunity to show why the award should not be corrected.

1287. 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 1286.2, the court with the consent of the parties to the court proceeding 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 nevertheless be held and the award made within an equal period of time beginning with the date of the order for rehearing but only if the court determines that the purpose of the time limit agreed upon by the parties to the arbitration agreement will not be frustrated by the application of this provision.

1287.2. The court shall dismiss the proceeding under this chapter as to any person named as a respondent if the court determines that such person was not bound by the arbitration award and was not a party to the arbitration.

1287.4. 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.

1287.6. An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration.

## Article 2. Limitations of Time

1288. A petition to confirm an award 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 to vacate an award or to correct an award shall be served and filed not later than 100 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 100 days after the date of service of a signed copy of the award upon:

(a) The respondent if he was a party to the arbitration; or

(b) The respondent's representative if the respondent was not a party to the arbitration.

1288.4. 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.

1288.6. 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.

1288.8. 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 this article 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.

## 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 filing 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 or avoided.

1290.2. A petition under this title shall be heard in a summary way 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 provided in this section for serving and filing a response may be extended by an agreement in writing between the parties to the court proceeding 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 shall be made by the court whenever an order or judgment, except a special order after final judgment, is made that is appealable under this title.

1291.2. In all proceedings brought under the provisions of this title, all courts wherein such proceedings are pending shall give such proceedings preference over all other civil actions or proceedings, except older matters of the same character and matters to which special precedence may be given by law, in the matter of setting the same for hearing and in hearing the same to the end that all such proceedings shall be quickly heard and determined.

## Article 2. Venue, Jurisdiction and Costs

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

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

(b) If the agreement does not specify a county where the agreement is to be performed and the agreement was not made in any county in this State, the county where any party to the court proceeding 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 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 referable 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 this title, the court in which such petition was filed retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any such subsequent petition shall be filed in the same proceeding.

1292.8. A motion for a stay of an action on the ground that an issue therein is subject to arbitration shall be made in the court where the action is pending.

1293. 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.

1293.2. 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 aggrieved party may appeal from:

- (a) An order dismissing or denying a petition to compel arbitration.
- (b) An order dismissing a petition to confirm, correct or vacate an award.
- (c) An order vacating an award unless a rehearing in arbitration is ordered.
- (d) A judgment entered pursuant to this title.
- (e) A special order after final judgment.

1294.2. The appeal shall be taken in the same manner as an appeal from an order or judgment in a civil action. Upon an appeal from any order or judgment under this title, the court may review the decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The respondent on the appeal, or party in whose favor the judgment or order was given may, without appealing from such judgment, request the court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment or order from which the appeal is taken. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken.

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. (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, *or a person appointed pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure relating to arbitration*, 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 *or person appointed pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure* 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.

SEC. 6. Section 1647.5 of the Labor Code is amended to read:

1647.5. Notwithstanding Sections 1626 and 1647 of the Labor Code ~~and Section 1280 of the Code of Civil Procedure~~, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

(a) If the provision is contained in a contract between an employment agency and a person for whom such employment agency under the contract undertakes to endeavor to secure employment,

(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to an employment agency,

(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and,

(d) If the contract provides that the Labor Commissioner or his authorized representative has the right to attend all arbitration hearings.

Except as otherwise provided in this section, any such arbitration shall be governed by the provisions of Title ~~X~~ 9 (*commencing with Section 1280*) of Part ~~III~~ 3 of the Code of Civil Procedure.

If there is such an arbitration provision in such a contract, the contract need not provide that the employment agency agrees to refer any controversy between the applicant and the employment agency regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1647 shall not apply to controversies pertaining to the contract.

*A provision in a contract providing for the decision by arbitration of any controversy arising under this chapter which does not meet the requirements of this section is not made valid by Section 1281 of the Code of Civil Procedure.*

SEC. 7. Section 1700.45 of the Labor Code is amended to read:

1700.45. Notwithstanding Section 1700.44 of the Labor Code ~~and Section 1280 of the Code of Civil Procedure~~, a provision in a contract providing for the decision by arbitration of any controversy under the contract or as to its existence, validity, construction, performance, nonperformance, breach, operation, continuance, or termination, shall be valid:

(a) If the provision is contained in a contract between an artists' manager and a person for whom such artists' manager under the contract undertakes to endeavor to secure employment,

(b) If the provision is inserted in the contract pursuant to any rule, regulation, or contract of a bona fide labor union regulating the relations of its members to an artists' manager,

(c) If the contract provides for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and

(d) If the contract provides that the Labor Commissioner or his authorized representative has the right to attend all arbitration hearings.

Except as otherwise provided in this section, any such arbitration shall be governed by the provisions of Title ~~IX~~ 9 (commencing ~~at~~ with Section 1280) of Part 3 of the Code of Civil Procedure.

If there is such an arbitration provision in such a contract, the contract need not provide that the artists' manager agrees to refer any controversy between the applicant and the artists' manager regarding the terms of the contract to the Labor Commissioner for adjustment, and Section 1700.44 shall not apply to controversies pertaining to the contract.

*A provision in a contract providing for the decision by arbitration of any controversy arising under this chapter which does not meet the requirements of this section is not made valid by Section 1281 of the Code of Civil Procedure.*

SEC. 8. This act applies to all contracts whether executed before or after the effective date of this act except that Section 1293 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 does apply to any renewal or extension of an existing contract on or after the effective date of this act.





# A STUDY RELATING TO ARBITRATION \*

## INTRODUCTION

When parties fail to settle a dispute by negotiation between themselves, they can agree to submit it to an arbitrator, a disinterested person, for a final and binding decision. Situations in which arbitration may be resorted to are almost limitless. Some examples are:

—To determine the loss of value to goods damaged in transit.

—To set the new rental under an option to renew a lease.

—To settle disputes between a contractor and owner arising out of a construction contract.

—To handle present and future disputes between partners or stockholders in closely held corporations.

—To settle disputes at the terminal point in grievance procedures contained in collective bargaining agreements.

The use of arbitration has increased rapidly in the last several decades. Currently in the United States, aside from personal injury cases and cases in which the government is a party,<sup>1</sup> more than 70 per cent of our total civil litigation is decided through arbitration rather than by the courts.<sup>2</sup> It is estimated that 90 per cent of all collective bargaining agreements in the United States provide for arbitration as the final step in their grievance procedures.<sup>3</sup> In New York the Rubber Trade Association arbitrates approximately 1,000 cases per year. And in New York City commercial disputes decided through the facilities of the American Arbitration Association alone exceed similar cases tried in the Federal District Courts.<sup>4</sup>

Parties ordinarily resort to arbitration because they believe it is a fast, efficient and economical method of settling their disputes. And it allows the parties to select someone who is an expert in the area of the dispute to settle their difference.

The parties may present their positions, evidence and arguments at an informal type of hearing. Or the parties may agree to make their presentation by written briefs. Often they use a combination of these methods. Thus the parties can select the procedure best suited to the type of dispute involved and the relationship of the parties.

\* This study was made at the direction of the Law Revision Commission by Mr. Sam Kagel, a member of the California State Bar and Professor of Law, University of California at Berkeley. The author has had numerous meetings with the Law Revision Commission since the date this study was submitted to the Commission and, he has indicated that, had time permitted, he would probably have made some changes in this study as a result of these meetings.

<sup>1</sup> A municipal corporation may submit a matter to arbitration. *Cary v. Long*, 181 Cal. 443, 184 Pac. 857 (1919).

<sup>2</sup> Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROB. 698 (1952).

<sup>3</sup> Moore & Nix, *Arbitration Provisions in Collective Agreements, 1952*, 76 MONTHLY LAB. REV. 261 (U.S. Dept of Labor 1953).

<sup>4</sup> Smith, *Commercial Arbitration at the American Arbitration Association*, 11 ARB. J. (n.s.) 3, 4 (1956).

California and many other industrial states seek to preserve and encourage the use of arbitration to settle disputes. For example, as Presiding Justice Peters stated in *Crofoot v. Blair Holdings Corp.*,<sup>5</sup> there is

a strong public policy in favor of arbitrations, which policy has frequently been approved and enforced by the courts.<sup>6</sup>

A public policy favorable to arbitration is one that keeps the law from prohibiting, interfering with or discouraging arbitration when the parties have voluntarily chosen to resort to this method for the settlement of their disputes. It is a policy which directs the law to facilitate carrying out the process of arbitration, to enforce agreements to arbitrate when the parties have made such an agreement and to enforce arbitration awards.

California, since the adoption of a modern arbitration statute in 1927, has consistently reflected a friendly policy toward the arbitration process.<sup>7</sup> Any analysis of the present law of arbitration in California and proposal for its revision must use this established policy as a frame of reference.

At the outset it should be noted that an examination of the Arbitration Act of California does not reveal the need for very serious or major changes. A leading authority on arbitration law, Wesley A. Sturges, lists California's arbitration statute as one that already follows the general pattern of desirable standards for a state arbitration statute.<sup>8</sup> However, his general comment on some of the statutes certainly may be applied to the California statute when he says:

[S]ome of these statutes reflect less faithfully than should be the virtues of simplicity and precision of draftsmanship.<sup>9</sup>

This present study consists of a critical examination of the California statute and related court decisions.<sup>10</sup> It includes general background material on arbitration, an analysis of present California statutory and case law concerning arbitration, and a comparison of California law with that of other states and with the Uniform Arbitration Act.

Specific suggestions will be made:

- (1) To include some new provisions in the statute.
- (2) To codify certain desirable court decisions and to cancel out certain undesirable decisions.
- (3) To make some minor procedural changes.

<sup>5</sup> 119 Cal. App.2d 156, 260 P.2d 156 (1953).

<sup>6</sup> *Id.* at 184, 260 P.2d at 170.

<sup>7</sup> *Firestone Tire & Rubber Co. v. United Rubber Workers*, 168 Cal. App.2d 444, 335 P.2d 990 (1959).

<sup>8</sup> Sturges, *Some General Standards for a State Arbitration Statute*, 7 ARB. J. (n.s.) 194, 199 (1952).

<sup>9</sup> *Id.* at 199.

<sup>10</sup> There have been a number of studies on arbitration law in California. The reader is referred to these studies for further discussion of the subject of this study: Feldman, *Arbitration Law in California: Private Tribunals for Private Government*, 30 So. CAL. L. REV. 375 (1957); Gang, *Commercial Arbitration in California*, 15 CALIF. L. REV. 289 (1927); Kagel, *Labor and Commercial Arbitration Under the California Arbitration Statute*, 38 CALIF. L. REV. 799 (1950); Comment, *Arbitration and Award: Commercial Arbitration in California*, 17 CALIF. L. REV. 643 (1929). In addition several unpublished studies are on file with the California Law Revision Commission: Kagel, *A Study of a Proposed Act to Amend the California Arbitration Statute* (1958); Kagel, *Comparison and Analysis of the Uniform Arbitration and California Arbitration Statute* (1956).

- (4) To improve the draftsmanship and internal organization of the statute.

### NATURE OF ARBITRATION

Arbitration is a voluntary procedure for settling disputes. It has at least three necessary elements.<sup>11</sup>

(1) It is a voluntary process. The parties need not choose to submit their disputes to arbitration, but they may enter into a voluntary agreement to submit the dispute to a third party who will settle it.

(2) The process of arbitration is a final determination of the rights of the parties. It is this aspect of arbitration that has led some people to believe that the process is of a compulsory nature. But a sharp distinction must be drawn between the voluntary agreement to arbitrate and the obligation that results from that agreement once made.

(3) The arbitrator is chosen by the parties. This is in clear contrast to litigation where the parties have no direct voice in the choice of the judge.

### HISTORICAL BACKGROUND

#### Common Law

As a process for settling disputes, arbitration existed several centuries before the beginning of English common law.<sup>12</sup> Early English decisions on agreements to arbitrate clearly indicated that the English courts wished to discourage arbitration.<sup>13</sup> Under common law rules, agreements to submit disputes to arbitration were revocable by either party at any time prior to the award, and thus, could not be specifically enforced.<sup>14</sup> The common law did, however, allow enforcement of arbitration awards by bringing an action on the award.<sup>15</sup>

A body of common law has evolved with respect to arbitration. The specific common law rules will be discussed under the appropriate headings later in this study.

#### Legislation on Arbitration

England has altered its common law rules on arbitration by a series of statutes beginning in 1698 and culminating in 1950.<sup>16</sup> The 1950 act provides that agreements to arbitrate both existing and future disputes are irrevocable, and that these agreements may, in the discretion of the courts, be specifically enforced.<sup>17</sup>

<sup>11</sup> See Feldman, *Arbitration Law in California: Private Tribunals for Private Government*, 30 SO. CAL. L. REV. 375, 380 (1957); KELLOR, *ARBITRATION IN ACTION* (1941); AMERICAN ARBITRATION ASS'N, *LABOR ARBITRATION PROCEDURES AND TECHNIQUES* 5 (1957).

<sup>12</sup> ELKOURI, *HOW ARBITRATION WORKS* 2 (1952); KELLOR, *AMERICAN ARBITRATION* 3-8 (1948); Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597 (1928); Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934).

<sup>13</sup> Wolaver, *supra* note 12, at 138. *But see* Sayre, *supra* note 12, at 603.

<sup>14</sup> *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924). Wolaver, *supra* note 12, at 138. For an excellent historical note on enforceability of arbitration agreements, see *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982 (2d Cir. 1942).

<sup>15</sup> See HOGG, *ARBITRATION* 3 (1936); STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* § 3, p. 9 (1930).

<sup>16</sup> 9 & 10 Wm. 3, c. 15 (1698); 3 & 4 Wm. 4, c. 42 (1833); 17 & 18 Vict. c. 125 (1854); 52 & 53 Vict. c. 49 (1889); 10 & 11 Geo. 5, c. 81 (1920); 14 & 15 Geo. 5, c. 39 (1924); 13 Geo. 5, c. 15 (1930); 24 & 25 Geo. 5, c. 14 (1934); 14 Geo. 6, c. 27 (1950).

<sup>17</sup> 14 Geo. 6, c. 27 (1950).

Early arbitration statutes in the United States were concerned with providing simple procedures for the enforcement of arbitration awards.<sup>18</sup> The procedures adopted for this purpose included making the submission of a dispute to arbitrators a rule of court which could be enforced by contempt proceedings and permitting an award to be reduced to a judgment without bringing a civil suit.<sup>19</sup>

Later statutes also provided for specific performance of agreements to arbitrate existing disputes. In 1920 the State of New York adopted an arbitration act which provided for specific performance of agreements to arbitrate both existing and future controversies.<sup>20</sup> The New York act also established comprehensive rules concerning other aspects of the arbitration process. That act served as a pattern for other states, including New Jersey and Oregon (both of which adopted their acts prior to 1924),<sup>21</sup> and for the United States Arbitration Act which was adopted in 1924.<sup>22</sup>

The first Uniform Arbitration Act, proposed by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1925,<sup>23</sup> provided for specific performance of agreements to arbitrate existing disputes only. This limited application was subsequently broadened by the Uniform Arbitration Act proposed in 1955 to provide for specific performance of both existing and future disputes.<sup>24</sup> Unless otherwise indicated, references in this study to the Uniform Arbitration Act are to the 1955 Uniform Arbitration Act.

### California Legislation

California enacted its first arbitration statute in 1851.<sup>25</sup> It was re-enacted in 1872 as Code of Civil Procedure Sections 1281 to 1290. Absolute specific performance of agreements to arbitrate was not available under the early California law, for Section 1283 of the 1872 statute provided that

if the submission is not made an order of the Court, it may be revoked at any time before the award is made.

The present California arbitration statute, Code of Civil Procedure Sections 1280 to 1293, enacted in 1927, was patterned after the New Jersey Arbitration Act,<sup>26</sup> except for a few minor details. Basically, the California statute provides for the specific performance of agreements to arbitrate both present and future disputes and a summary means to enforce arbitration awards.

<sup>18</sup> For example, N.Y. Laws 1791, ch. 20, at 219; 13 Laws of Va. 63 (Hening 1789).  
<sup>19</sup> Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 VAND. L. REV. 685 (1957).

<sup>20</sup> N.Y. Laws 1920, ch. 275, p. 803.

<sup>21</sup> N.J. STAT. ANN. §§ 2A:24-1 to 2A:24-11 (1952); ORE. REV. STAT. §§ 33.210-340 (1955); and see, ARIZ. REV. STAT. ANN. §§ 12-1501 to 12-1511 (1956); CAL. CODE CIV. PROC. §§ 1280 to 1293; CONN. GEN. STAT. §§ 52-408 to 52-424 (1958); LA. CIV. CODE tit. XIX, art. 3099-3132 (1947); MASS. ANN. LAWS ch. 251, §§ 1-22 (1933); MICH. COMP. LAWS §§ 645.1 to 645.24 (1948); N.H. REV. STAT. ANN. §§ 542:1-10 (1955); OHIO REV. CODE ANN. §§ 2711.01 to 2711.15 (1954); PA. STAT. ANN. tit. 5, §§ 161-81 (1930); R.I. GEN. LAWS §§ 10-3-2 to -3-20 (1957); WASH. REV. CODE §§ 7.04-010 to 7.04-220 (1951); WIS. STAT. §§ 298.01 to 298.18 (1959).

<sup>22</sup> 9 U.S.C. § 1-14 (1958).

<sup>23</sup> 50 A.B.A. REP. 135-62 (1925); Isaacson, *A Partial Defense of the Uniform Arbitration Act*, 7 LAB. L.J. 329 (1956).

<sup>24</sup> 1954 UNIFORM ARBITRATION ACT PROCEEDINGS at 1-H to 7-H.

<sup>25</sup> Cal. Stat. 1851, §§ 380-389, pp. 111-13.

<sup>26</sup> N.J. STAT. ANN. §§ 2A:24-1 to 2A:24-11 (1952).

**DISPLACEMENT OF COMMON LAW ARBITRATION  
BY STATUTORY ARBITRATION**

**Present Status of Common Law Arbitration in California**

On its face, the California statute is unclear as to whether common law arbitration exists in addition to statutory arbitration law. The question had been touched on in a few cases subsequent to the 1927 statute,<sup>27</sup> but it was not until the 1953 decision in *Crofoot v. Blair Holdings Corp.*<sup>28</sup> that it was made clear that the doctrines applicable to a common law arbitration are no longer recognized in California as applicable to written agreements to arbitrate. However, the status of common law arbitration as it relates to the various types of arbitration agreements not now within the statute is still somewhat uncertain.

In some states, and apparently under the Uniform Arbitration Act, common law arbitration exists side by side with statutory arbitration.<sup>29</sup> This condition leads to confusion, for the rights obtainable under each system of law are substantially different. The common law generally operates in derogation of the arbitration process, while the statutory system seeks to make it work.

The following tabulation notes some of these differences.

| Common law  | California statute   |
|---|--|
| No specific performance of agreements to arbitrate existing or future disputes.   | Specific performance available.                                  |
| Either party may revoke an agreement before award made.   | No revocation.   |
| Award enforced by an action on the award.   | Award entered as judgment.                                       |
| If after filing suit, parties agree to a common law arbitration, this results in a voluntary withdrawal of suit from jurisdiction of the court. | Agreement to arbitrate only stays suit.                          |
| Despite a referral of a matter to arbitration, a party may bring an action.   | Such an action can be stayed.                                    |
| If the parties cannot select an arbitrator, the agreement to arbitrate is a nullity.  | Court shall appoint the arbitrator.                              |
| No power in arbitrator or courts to issue subpoenas or arrange for depositions.   | Such power is given arbitrator.                                  |
| No remedy to correct errors in award.   | Statute provides for method of correcting award or modifying it. |

Since California public policy favors arbitration, no system of law should be retained that neither fully accepts arbitration nor aids its operation. This study hereinafter recommends that the statute apply to both written and oral agreements to arbitrate and to appraisals. Thus there would be no area lying totally outside the statute. Accordingly, it is recommended that the California statute be amended so that it states clearly that only statutory arbitration applies in California.

<sup>27</sup> *Cockrill v. Murphis*, 68 Cal. App.2d 184, 156 P.2d 265 (1945); *Rives-Strong Bldg. v. Bk. of America*, 50 Cal. App.2d 810, 123 P.2d 942 (1942).

<sup>28</sup> 119 Cal. App.2d 156, 260 P.2d 156 (1953).

<sup>29</sup> STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* 2-6 (1930): "The view is almost uniformly held that parties may arbitrate under common law rules notwithstanding the existence of an arbitration statute. The arbitration statutes of the different jurisdictions are regarded as merely cumulative." *Id.* at 2.

## Oral Agreements To Arbitrate

The present California statute applies only to written agreements to arbitrate<sup>30</sup> as does the Uniform Arbitration Act.<sup>31</sup> It is possible, however, that the common law applies to oral agreements to arbitrate. But, as indicated above, there is some question whether any type of common law arbitration is still recognized in California.

In any event, there is little reason to exclude oral agreements from the statute. As a matter of practice, oral agreements are virtually never made. But if a party does enter into an oral agreement to arbitrate, the agreement should have the same force and effect as a written agreement and should be subject to the same procedures for enforcement. The intent of the parties is clearly the same in both cases—only the form differs. Reluctance to enforce oral agreements specifically stems from the problem of proof of the oral agreement and not from any defect in the agreement itself. The problem of proof of the oral agreement should not be confused with its enforcement once its existence and terms have been proved.

Further, by clearly bringing oral agreements within the statute, the uncertainty concerning the co-existence of common law and statutory arbitration would be resolved in favor of statutory arbitration exclusively. Such an end is desirable.

### MATTERS SUBJECT TO ARBITRATION

#### Present and Future Disputes

As stated earlier, agreements to arbitrate both existing and future disputes are clearly within the terms of the present California statute,<sup>32</sup> and the 1955 Uniform Arbitration Act has been extended to include future disputes.<sup>33</sup> Some states, however, still restrict their statutory coverage to existing disputes as did the 1925 Uniform Arbitration Act.<sup>34</sup> No change should be made in the California statute. Indeed, the mark of a modern arbitration statute is that it applies to agreements to arbitrate both present and future disputes.

#### Non-justiciable Questions

Although under common law justiciable and non-justiciable questions were treated alike,<sup>35</sup> earlier statutes, including the 1851 California Act, did distinguish between the two types of questions by limiting the coverage of the act to controversies which might be the subject of a civil action.<sup>36</sup> Some states continue to make this distinction in their arbitration statutes.<sup>37</sup> There is no distinction between justiciable and non-justiciable questions in the present California statute. Nor have

<sup>30</sup> CAL. CODE CIV. PROC. § 1280.

<sup>31</sup> UNIFORM ARBITRATION ACT § 1.

<sup>32</sup> CAL. CODE CIV. PROC. §§ 1280, 1281.

<sup>33</sup> UNIFORM ARBITRATION ACT § 1.

<sup>34</sup> Arkansas, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine (but does enforce labor agreements to arbitrate), Maryland, Montana, Nevada, New Mexico, North Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming.

<sup>35</sup> STURGES, COMMERCIAL ARBITRATIONS AND AWARDS 198 (1930).

<sup>36</sup> Cal. Stat. 1851, § 380, p. 111.

<sup>37</sup> MASS. ANN. LAWS ch. 251, §§ 1, 14 (1933); ARK. STAT. ANN. § 34-502 (1947) ("all controversies, which might be the subject of a suit or action"); COLO. R. CIV. P. 109 (1953) ("all controversies, which may be the subject of a civil action");

the California courts made any such distinction in the application of the statute. The Uniform Arbitration Act also makes no such distinction.

Arbitration agreements covering non-justiciable disputes most often occur in partnership agreements and in collective bargaining agreements and they are sometimes used to resolve policy questions in deadlocked corporations. Using "non-justiciable" in a highly technical sense, the term includes many other types of disputes in which there is a procedural bar to a legal action.

It may be argued that agreements to arbitrate non-justiciable disputes should not be specifically enforced because there are no set rules or standards that can be used by the arbitrator as his guide in determining the problem. Along this same line it is also urged that this is a process by which the law endows the arbitrator with jurisdiction to decide matters that could not be decided by a court of law.

These arguments are not entitled to any weight if the nature of the initial agreement to arbitrate is recalled. The law does not endow the arbitrator with jurisdiction; it is the parties who grant this authority to the arbitrator. And it is assumed that this authority is granted only after consideration of alternative methods of settling and avoiding disputes. For example, an agreement between an employer and a union to use arbitration to settle a dispute over the substantive terms of their agreement rather than to invite a strike or lockout would seem to be the kind of agreement the law should enforce. Clearly the law must enforce and sanction arrangements providing for the peaceful and orderly settlement of disputes, whether in the arena of labor relations or in the business world. Accordingly, it is recommended that no change be made in the existing California law.

### Questions of Law

The California Arbitration Statute has been held to apply to disputes involving questions of law or of fact.<sup>38</sup> In *Pacific Indemnity Co. v. Insurance Co.*<sup>39</sup> the court stated:

This section is broad enough to authorize the submission of any and all questions arising under a contract, whether such questions

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IDAHO CODE ANN. § 7-901 (1947) (any controversy which might be the subject of a civil action); IND. ANN. STAT. § 3-201 (1946) ("any controversy existing between them which might be the subject of a suit at law"); IOWA CODE § 679.1 (1958) ("all controversies which might be the subject of an action"); KY. REV. STAT. § 417.010 (1959) ("any controversy that might be the subject of an action"); ME. REV. STAT. ch. 121, § 1 (1954) ("all controversies which may be the subject of a personal action"); MICH. COMP. LAWS § 645 (1948) ("any controversy . . . which might be the subject of an action at law, or of a suit in chancery"); MISS. CODE ANN. § 279 (1956) ("any controversy . . . which might be the subject of an action"); MO. REV. STAT. § 435.020 (1949) ("any controversy which might be the subject of an action"); MONT. REV. CODES ANN. § 93-201-1 (1947) ("any controversy which might be the subject of a civil action"); NEB. REV. STAT. § 25-2103 (1956) ("all controversies, which might be the subject of civil actions"); N.M. STAT. ANN. § 22-3-6 (1953) ("any question or difficulty that might result in a suit"); N.Y. CIV. PRAC. ACT § 1448 ("any controversy . . . which may be the subject to an action"); N.D. REV. CODE § 32-2901 (1943) ("any controversy which might be the subject of a civil action"); TENN. CODE ANN. § 23-501 (1956) ("all causes of action"); WASH. REV. CODE § 7.04.010 (1956) ("any controversy which may be the subject of an action"). The New York, Michigan and Washington statutes quoted impose the justiciable question requirement upon agreements to submit existing disputes to arbitration. All three states provide that parties may also contract to settle by arbitration "any dispute thereafter arising."

<sup>38</sup> *Cecil v. Bank of America*, 142 Cal. App.2d 249, 298 P.2d 24 (1956); *Crofoot v. Blair Holdings Corp.*, 119 Cal. App.2d 156, 260 P.2d 156 (1953).

<sup>39</sup> 25 F.2d 930 (9th Cir. 1928); Comment, 17 CALIF. L. REV. 643, 649-50 (1929).



relate to the construction of the contract or to questions of law or fact arising thereunder.<sup>40</sup>

The common law of arbitration makes no distinction between questions of law and fact submitted to arbitration.<sup>41</sup> Nor does the Uniform Arbitration Act make such a distinction.

Some states do have a provision that allows the parties or the arbitrator to submit questions of law to a court for a ruling prior to the completion of the arbitration proceedings.<sup>42</sup> At one time the Commissioners on Uniform State Laws made a similar proposal, but after further consideration this proposal was dropped and does not appear as a part of the Uniform Arbitration Act.<sup>43</sup>

There are no policy considerations that would warrant a departure from the existing California law on this matter. In fact, policy considerations overwhelmingly support the existing law. Disputes submitted to arbitrators usually involve mixed questions of law and of fact. One of the primary motives for agreements to arbitrate is the desire for a quick settlement of the dispute. The procedure of referring certain questions of law to the court before the arbitrator makes a decision could cause serious delay and confusion, thus robbing the arbitration procedure of much of its value to the parties.

No change in existing California law is recommended on this matter, but it is suggested in the interest of clarity that the case law on this point be codified and made a part of the statute.

### Labor-Management Agreements To Arbitrate

Courts have held that labor-management agreements to arbitrate are included within the present California statute despite the language of Section 1280 of the Code of Civil Procedure, which provides that "the provisions of this title shall not apply to contracts pertaining to labor." The courts reach this conclusion through the following noted cases.

In *Universal Pictures Corp. v. Superior Court*<sup>44</sup> the court defined the word "labor" to apply

to that kind of human energy wherein physical force, or brawn and muscle, however skilfully employed, constitute the principal effort to produce a given result, rather than where the result to be accomplished depends primarily upon the exercise of the mental faculties.<sup>45</sup>

The court held that an actor was not performing labor within the meaning of the statute. In subsequent cases the court found that a sales manager was not performing labor within the meaning of the statute,<sup>46</sup> nor was an artist.<sup>47</sup>

<sup>40</sup> *Pacific Indemnity Co. v. Insurance Co.*, 25 F.2d 930, 932 (9th Cir. 1928).

<sup>41</sup> *STURGES, COMMERCIAL ARBITRATIONS AND AWARDS* 198, 210 (1930).

<sup>42</sup> ILL. ANN. STAT. ch. 10, § 6 (1941); MASS. ANN. LAWS ch. 251, § 20 (1933); NEV. REV. STAT. § 38.140 (1959); N.C. GEN. STAT. § 1-556 (1953); PA. STAT. ANN. tit. 5, § 177 (1930); UTAH CODE ANN. § 78-31-13 (1953); WYO. STAT. § 1-1038 (1957).

<sup>43</sup> Compare Section 1 of the 1925 Uniform Arbitration Act with Section 1 of the 1955 Uniform Arbitration Act.

<sup>44</sup> 9 Cal. App.2d 490, 50 P.2d 500 (1935).

<sup>45</sup> *Id.* at 494, 50 P.2d at 502.

<sup>46</sup> *Kerr v. Nelson*, 7 Cal.2d 85, 59 P.2d 821 (1936).

<sup>47</sup> *Robinson v. Superior Court*, 35 Cal.2d 379, 218 P.2d 10 (1950).

In *Levy v. Superior Court*,<sup>48</sup> the court had before it an agreement to arbitrate labor-management disputes. The arbitration agreement was contained in a collective bargaining contract. The workers involved were production workers in a garment factory. It is conceivable that the workers would have come within the definition of labor stated in the *Universal Pictures* case. But in the *Levy* case the court did not rest its decision on a definition of labor as such but rather on a consideration of what constituted "contracts pertaining to labor." The court stated:

The considerations bearing upon the question of the intent of the legislature in excluding contracts "pertaining to labor" from the arbitration agreement enforcement statutes lead to the conclusion that the legislature had in mind contracts pertaining to the actual hiring of labor between employer and laborer. . . . The function of the collective bargaining agreement is to lay down the relative duties or obligations to be observed between the employer and the union, and itself contemplates that the contract of hiring shall be a distinct and separate transaction.<sup>49</sup>

On the basis of this distinction between the two contracts, the court held that agreements to arbitrate disputes found in collective bargaining agreements were within the coverage of the general arbitration statute, and that the language of Section 1280 of the Code of Civil Procedure did not exclude such agreements from the terms of the statute. The ruling on collective bargaining agreements in the *Levy* case has never been questioned by California courts. Numerous decisions subsequent to that case have been based on a recognition that the general statute provisions apply to collective bargaining agreements.<sup>50</sup>

Some states have excluded labor-management agreements to arbitrate from their general arbitration statutes.<sup>51</sup> Other states have excluded labor-management agreements from the general statute, but have provided for them separately by special statutes.<sup>52</sup> The exclusion of this type of arbitration agreement from general arbitration statutes usually is based on the following arguments:<sup>53</sup>

(1) An agreement to arbitrate labor-management disputes is unique. Arbitrations arising under this type of agreement may include non-justiciable questions. The undesirability of recognizing a distinction between justiciable and non-justiciable questions has already been discussed.

(2) Another argument advanced to exclude labor-management arbitration agreements from the general arbitration statute is based on the continuing relationship of the parties. However, parties who engage in commercial arbitration may also have a continuing relationship. The same buyers and sellers may continue to do business with each other over a long period of time.

<sup>48</sup> 15 Cal.2d 692, 104 P.2d 770 (1940); this case is noted in *Recent Decisions*, 29 CALIF. L. REV. 411 (1941), and *Recent Cases*, 54 HARV. L. REV. 500 (1941).

<sup>49</sup> *Levy v. Superior Court*, 15 Cal.2d 692, 699, 104 P.2d 770, 773-74 (1940).

<sup>50</sup> For example, *Alpha Beta Food Markets v. Retail Clerks*, 45 Cal.2d 764, 291 P.2d 433 (1955); *Ulene v. Murray Millman of California*, 175 Cal. App.2d 655, 346 P.2d 494 (1959); *Los Angeles Local etc. Bd. v. Stan's Drive-Ins, Inc.*, 136 Cal. App.2d 89, 288 P.2d 286 (1955).

<sup>51</sup> Arizona, Michigan, New Hampshire, Oregon, Wisconsin.

<sup>52</sup> For example, Colorado, Connecticut, Iowa, Maine, Maryland, Massachusetts, Montana, New Hampshire.

<sup>53</sup> Frey, *The Proposed Uniform Arbitration Act Should Not Be Adopted*, 10 VAND. L. R. 709 (1957).

(3) A further argument for separate or special treatment of labor-management agreements to arbitrate disputes seems to arise from the erroneous belief that bringing an arbitration agreement within the statute robs it of some of its voluntary aspects and substitutes a compulsory characteristic. This is certainly not the effect of the statute. Again it is necessary to distinguish between the enforcement of an agreement after the agreement has been entered into voluntarily and the requirement that parties enter into an agreement in the first place. Nothing in the present California statute or any proposed statutory regulation of arbitration requires the parties initially to select arbitration as a means of settling their disputes.

As previously noted some states have separate statutes—one covering arbitration generally and another covering labor arbitration. Often the purpose of the special labor arbitration statute is to make labor arbitration even more attractive to the parties by setting up special tribunals or special methods by which tribunals can be created for use in labor-management disputes and, in some cases by providing free arbitration.<sup>54</sup>

Although California has encouraged arbitration of labor-management disputes,<sup>55</sup> at no time has it indicated any desire to create a special arbitration tribunal which would be available to the parties for arbitration of labor-management disputes. Nor is there any indication that this type of tribunal is presently necessary.

The Uniform Arbitration Act<sup>56</sup> has an optional provision—and a few states have similar provisions—which permits the parties to labor-management arbitration agreements to exclude themselves from the applicability of the statute. Such a provision is extremely undesirable. It could only lead to confusion within the area of labor relations. The stipulation not to be covered by the statute would be agreed to in many instances without a realization of its consequences.

It must be concluded that labor-management arbitration agreements should be included in the general arbitration statute. This is the present California law. Thus there is no reason to exclude such agreements from the statute or to have separate statutes applicable to labor and commercial arbitration or to permit parties to stipulate that the law should not apply to them.

However, it would be desirable to state clearly in the statute that labor-management arbitration agreements are included within the statute. Words to that effect should be added to the statute, or the phrase “contracts pertaining to labor” could be deleted from the present law. Labor-management arbitration agreements would then clearly be within the statute, as would be the type of arbitration agreement involved in the *Universal Pictures* case and similar decisions.

### Appraisals and Valuations

California courts have excluded valuations, appraisals and similar proceedings from the coverage of the arbitration statute on two general grounds: One, that an appraisal does not involve a controversy, and two, that an appraisal is not an arbitration in that the parties

<sup>54</sup> For example, Connecticut.

<sup>55</sup> CAL. LABOR CODE § 65.

<sup>56</sup> UNIFORM ARBITRATION ACT § 1.

contemplated neither a formal hearing nor the taking of evidence. A leading case on this point is the 1945 California Supreme Court case, *Bewick v. Mechem*.<sup>57</sup>

To say that there is no controversy when appraisals are resorted to is "question-begging and unhelpful."<sup>58</sup> It is obvious that the parties have found it necessary to resort to a third-party determination of the issue. Clearly a controversy exists. Furthermore, even in a true arbitration, the parties may dispense with either a formal hearing or the taking of evidence or both.<sup>59</sup>

The distinction between appraisals and arbitrations is in large part the result of the desire of the earlier cases specifically to enforce appraisal agreements by common law.<sup>60</sup> Common law would not allow such enforcement unless the courts found that appraisals were not arbitrations. In this State, however, arbitration agreements have been specifically enforceable since 1927 and such agreements often include the type of controversies represented by appraisals.<sup>61</sup> In view of the policy of enforcing such agreements,<sup>62</sup> it would seem far simpler to state that appraisals are arbitrations, or to assume that they are sufficiently close to arbitrations to be included within the coverage of the arbitration statute. The value in this approach is that it would give to the parties the efficient and quick methods of enforceability only available under that statute.

The Uniform Arbitration Act does not expressly exclude appraisals or valuation proceedings. The intention of the Commissioners on Uniform State Laws was stated as follows: "The intention is to leave that [valuation proceedings] to the decisions as they are, namely that appraisals of that character are not classified as arbitrations."<sup>63</sup> The New York statute, however, has an express provision covering appraisals and valuations.<sup>64</sup>

It is recommended that the California statute be amended to include a provision which expressly extends the coverage of the statute to appraisals and valuation proceedings.

### ENFORCEMENT OF ARBITRATION AGREEMENTS

Since there is a favorable attitude toward arbitration as an acceptable means of dispute settlement in California, one of the primary purposes of the statute should be to overcome the common law tradition that arbitration agreements are revocable prior to award and may not be specifically enforced. To achieve this objective the statute should include remedies designed to frustrate the breach of such agreements and to provide relief for the nonbreaching party.

There are several remedies that can be used for this purpose:

- (1) Provide for an order to compel specific performance of the agreement to arbitrate.

<sup>57</sup> 26 Cal.2d 92, 156 P.2d 757 (1945).

<sup>58</sup> 6 WILLISTON, CONTRACTS § 1921A, p. 5376 (1938).

<sup>59</sup> See comment in text *infra* at G-43 relating to the hearing.

<sup>60</sup> Dayton, Book Reviews, 45 HARV. L. REV. 771, 773 (1932).

<sup>61</sup> See, e.g., Solari v. Oneto, 166 Cal. App.2d 145, 333 P.2d 218 (1958).

<sup>62</sup> *Cockrill v. Murphis*, 68 Cal. App.2d 184, 156 P.2d 265 (1945); *Rives-Strong Bldg. v. Bk. of America*, 50 Cal. App.2d 810, 123 P.2d 942 (1942).

<sup>63</sup> 1955 UNIFORM ARBITRATION ACT PROCEEDINGS at 6.

<sup>64</sup> N.Y. Laws 1959, ch. 232, p. 983; N.Y. CIV. PRAC. ACT § 1448.

(2) Provide for a stay of a civil action upon an issue referable to arbitration.

(3) Provide for the appointment by the court of an arbitrator should the method determined by the parties for appointment fail, or should the arbitrator appointed by the parties be unable to serve.

California presently uses all of these devices. Section 1282 of the Code of Civil Procedure provides for specific performance of the agreement to arbitrate. Code of Civil Procedure Section 1284 provides for a stay of a civil action if the action involves an issue referable to arbitration. And Code of Civil Procedure Section 1283 gives the court authority to appoint an arbitrator if there is a failure to select an arbitrator by the method provided by the parties.

### Petition To Compel Arbitration

Although Section 1282 of the Code of Civil Procedure provides that an aggrieved party to an arbitration agreement can petition for an order to compel arbitration, the section does not state the facts that must be shown in the petition. Section 2(a) of the Uniform Arbitration Act provides that an application to compel arbitration must show an agreement to arbitrate and the opposing party's refusal to comply. To clarify this matter, it is recommended that the California law be revised to state specifically the matters required to be alleged in the petition for an order to arbitrate.

### Waiver of Right To Arbitrate

One aspect of Section 1282 of the Code of Civil Procedure has required court interpretation. Although this section gives a party to an arbitration agreement the right to obtain an order directing arbitration, the courts have held that an arbitration clause or submission is not self-executing and that this right for specific performance may be lost by waiver.<sup>65</sup>

Several cases have turned on whether the factual situation involved constituted waiver. If the arbitration agreement requires the parties to proceed within a certain time, permitting an unreasonable time to elapse constitutes a waiver of the right to enforce arbitration.<sup>66</sup> It is also a waiver if the arbitrable dispute is submitted to a court for decision without contending that it should be arbitrated.<sup>67</sup> Failure of a defendant to plead an arbitration agreement as a defense may also constitute a waiver.<sup>68</sup> A party may also waive his right to specific performance by repudiating the agreement.<sup>69</sup> But a cross-complaint answering specific issues raised by the plaintiffs in a civil action is not a waiver if the cross-complaint also sets out arbitration as a defense.<sup>70</sup>

<sup>65</sup> Local 659, I.A.T.S.E. v. Color Corp. Amer., 47 Cal.2d 189, 302 P.2d 294 (1956).  
Pneucrete Corp. v. U.S. Fid. & G. Co., 7 Cal. App.2d 733, 46 P.2d 1000 (1935).

<sup>66</sup> Jordan v. Friedman, 72 Cal. App.2d 726, 165 P.2d 728 (1946).

<sup>67</sup> Case v. Kadota Fig Assn., 35 Cal.2d 596, 220 P.2d 912 (1950); Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182 (1947).

<sup>68</sup> Pierce v. Wright, 117 Cal. App.2d 718, 256 P.2d 1049 (1953); Landreth v. South Coast Rock Co., 136 Cal. App. 457, 29 P.2d 225 (1934).

<sup>69</sup> Drake v. Stein, 116 Cal. App.2d 779, 254 P.2d 613 (1953).

<sup>70</sup> Squire's Dept. Store, Inc. v. Dudum, 115 Cal. App.2d 320, 252 P.2d 418 (1953).

The principle of waiver seems to be well accepted by the California courts. The only problem is the application of that principle to specific factual situations. It is not recommended that the case law on waiver be codified. However, there might be positive value in including in the statute a provision that the respondent may defeat the petition to compel arbitration if he proves that the moving party has waived his right to arbitrate. Such a statement will put the parties to arbitration agreements on notice that waiver is possible. Although the possibility of waiver is presently implied, an arbitration statute is read and applied by many laymen and, therefore, this implied defense should be clearly expressed.

### Determination of Merits of Controversy

Section 2(e) of the Uniform Arbitration Act provides that the court shall not refuse to order arbitration on the ground "that the claim in issue lacks merit or bona fides." This provision was inserted for the purpose of overcoming the doctrine established in *International Ass'n of Machinists v. Cutler-Hammer*,<sup>71</sup> a New York case. According to this doctrine, a court can, under the guise of determining whether there is in fact a dispute, interpret and apply the collective bargaining agreement. This should, of course, be the function of the arbitrator. Otherwise the arbitration agreement is rendered meaningless.

Although there is presently no specific section on this matter in the California statute, California courts have repeatedly followed the rule proposed in the Uniform Arbitration Act. For example, in a 1950 case<sup>72</sup> the District Court of Appeal said:

[O]n motions to stay or to compel arbitration the only issues which may be raised are whether an agreement to arbitrate was made and whether one of the parties has refused arbitration.<sup>73</sup>

And in a 1953 case,<sup>74</sup> the District Court of Appeal pointed out:

The trial court fell into the error of attempting to decide the merits of the controversy. That was a question that must be left to the determination of the arbitration board.<sup>75</sup>

Unfortunately the District Court of Appeal itself seems to be capable of falling into the same error. A recent California holding casts some doubt on what had appeared to be the settled law in California on this point. In *Pari-Mutuel etc. Guild v. Los Angeles Turf Club*,<sup>76</sup> the District Court of Appeal, applying the *Cutler-Hammer* doctrine, denied a motion to compel arbitration on the ground that the dispute lacked merit. It was clear from the facts of the case that the controversy came within the literal language of an arbitration clause; however, the court found that other sections of the collective bargaining agreement would make it impossible for the arbitrator to grant relief to the complaining party. In other words the court interpreted and

<sup>71</sup> 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

<sup>72</sup> *Myers v. Richfield Oil Corp.*, 98 Cal. App.2d 667, 220 P.2d 973 (1950). Petition for rehearing was denied August 16, 1950, and petition for hearing by the Supreme Court was denied September 21, 1950.

<sup>73</sup> *Id.* at 670, 220 P.2d at 975. And see *Weiman v. Superior Court*, 51 Cal.2d 710, 336 P.2d 489 (1959).

<sup>74</sup> *Krug v. Republic Pictures Corp.*, 120 Cal. App.2d 593, 261 P.2d 562 (1953).

<sup>75</sup> *Id.* at 597, 261 P.2d at 564.

<sup>76</sup> 169 Cal. App.2d 571, 337 P.2d 575 (1959).

applied the agreement to the controversy, thus deciding the controversy on its merits. It is submitted that there was sufficient leeway in the language of the agreement for a possible interpretation of the agreement other than that adopted by the court.

This assumption of authority by the court completely frustrates the purpose of the arbitration agreement. By entering into the agreement, the parties indicate their intention that the arbitrator, not the court, should interpret and apply the agreement to the controversy.

In view of the doubt raised by the *Pari-Mutuel* case, it is urged that the California arbitration statute be revised to include the substance of the Uniform Arbitration Act section on this matter. To leave the matter in doubt or to provide that this is a proper concern for the court would sanction a tactic in arbitration practice which the law should seek to avoid. In effect, it would encourage the parties to raise issues on the ground that the dispute lacks merit. Unnecessary delays would result. It should be remembered that if the arbitrator exceeds his jurisdiction, a party is not without remedy. This can always be a subject of review on a motion to vacate the award.

### Right to Jury Trial

Section 1282 of the Code of Civil Procedure provides that where there is an issue as to the existence of an agreement to arbitrate or a default thereunder, the party refusing to arbitrate may demand a jury trial on those issues. It is difficult to reconcile this provision with a statement in Section 1285 of the Code of Civil Procedure that "any application made under the authority of this act shall be heard in a summary way in the manner provided by law for the making and hearing of motions." This latter provision recognizes that one of the important purposes of an arbitration proceeding is speed in concluding the dispute. The provision for a jury trial could seriously prolong the time required for settlement of the dispute.

A repeal of the provision for a jury trial would not impinge upon the constitutional rights of the parties. The California Supreme Court has held that "a proceeding under Section 1282 of the Code of Civil Procedure, although in form a special proceeding, is in substance a suit in equity for specific performance of a contract to arbitrate."<sup>77</sup> It is well recognized that there is no constitutional right to a jury trial in equity proceedings.<sup>78</sup>

As a practical matter the repeal of this provision probably would not change present practice. It is difficult to find in practice instances where a party has requested a jury trial on this type of issue. There are no reported California decisions dealing with jury trial under the statute. It is recommended, therefore, that the provision granting the right to a jury trial on the issue of the existence of an agreement to arbitrate or a default thereunder should be deleted from the arbitration statute.

<sup>77</sup> *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 347, 182 P.2d 182, 190 (1947).  
<sup>78</sup> 3 AM. JUR., *Arbitration and Award*, § 79 (1936).

## Stay of Judicial Proceedings

Section 1284 of the Code of Civil Procedure provides that if a suit is brought upon an issue referable to arbitration, the court shall stay the action until the issue is arbitrated, provided that the party who applies for the stay is not in default upon the agreement to arbitrate.

In 1935 the Supreme Court held, in *Clogston v. Schiff-Lang Co., Inc.*,<sup>79</sup> that a party may not sue unless arbitration has taken place or an effort has been made to get the other party to arbitrate. There has been relatively little litigation on this problem and several questions concerning what constitutes default are still open. For example, it is not clear how far the plaintiff must go in his attempt to compel the other party to arbitrate. Is it necessary that he resort to the statute for specific performance, or is an oral or written request sufficient?

When a party requests a stay in a civil action on the basis of an agreement to arbitrate, he is using that agreement to arbitrate as a defense. But, under existing law, there is no provision that compels a person to arbitrate even though the action is stayed; hence, it may be necessary for the party whose action is stayed to commence another proceeding in a court having jurisdiction to order arbitration in order to compel the arbitration to proceed. If a party is going to request a stay because there is an arbitration agreement, he should show his willingness to proceed with the arbitration as the means of settling the dispute. The best way for the defendant to demonstrate this willingness is to obtain an order to compel arbitration.

Section 2(d) of the Uniform Arbitration Act handles this problem by providing that the stay of an action shall be granted "if an order for arbitration or an application therefor has been made under this section." Thus the initiation of a proceeding to compel arbitration under the agreement becomes a condition precedent for the granting of a stay.

It is recommended that this type of provision be included in the arbitration statute in order to state clearly the test that will be applied to determine the presence or absence of default.

## Stay of Arbitration

Section 2(b) of the Uniform Arbitration Act provides that application may be made to a court to stay a pending arbitration. The application must show that there is no agreement to arbitrate. The New York act has a similar provision which provides that a person who has not participated in the arbitration in any way may move to stay a pending arbitration.<sup>80</sup> Under such motion, the issues of the making of the agreement and failure to comply with it may be tried. There is no similar proceeding under California law.<sup>81</sup>

<sup>79</sup> 2 Cal.2d 414, 41 P.2d 555 (1935).

<sup>80</sup> N.Y. CIV. PRAC. ACT § 1458(2).

<sup>81</sup> *But see Ehrhart & Associates v. Superior Court*, 185 A.C.A. 1, 7 Cal. Rptr. 844 (1960) (proceedings to compel arbitration stayed pending determination of action for rescission of contract containing arbitration agreement).



## Appointment of Arbitrator by the Court

Generally the parties are able to agree on an arbitrator or they have provided in their agreement for a procedure to be followed in the event they cannot agree upon an arbitrator. But occasionally an agreement to arbitrate disputes become nonoperative because the parties cannot select an arbitrator. Section 1283 of the Code of Civil Procedure gives the court authority to appoint an arbitrator if any party to the agreement fails to avail himself of the method for selection agreed upon, or if there is a lapse in the naming of an arbitrator, or if an arbitrator fails or refuses to fulfill his duties. Either party may then make a motion to the court for the appointment of an arbitrator.<sup>82</sup> The court-appointed arbitrator acts as though he had been appointed pursuant to the agreement.<sup>83</sup> The Uniform Arbitration Act also grants this power to the court.<sup>84</sup>

One of the objections sometimes raised to giving the court authority to select an arbitrator is that the court may not know how to select an appropriate arbitrator.<sup>85</sup> There are, however, a number of qualified organizations that will supply lists of persons who might serve as arbitrators in various types of disputes. For instance, the American Arbitration Association has lists of persons for both commercial and labor-management disputes. Trade associations may also have persons available for commercial disputes. The Federal Mediation and Conciliation Service and the California State Conciliation Service will supply a list of arbitrators to the parties or to the court. To overcome the objection concerning the court's lack of expertise in this area, it is suggested that the arbitration statute be revised to include the procedure to be followed by the court in appointing an arbitrator. A provision such as that stated below would probably serve this purpose:

When appointing a neutral arbitrator the court shall nominate five persons from lists of qualified arbitrators supplied by the parties or recognized governmental agencies or by private, impartial associations concerned with arbitration. The parties shall within five days of receipt of such lists from the court select a single person by agreement or lot from such lists who shall thus be designated as the court appointed arbitrator. If the party or parties fail to act to select an arbitrator within the five day period the court shall appoint the arbitrator from among the nominees.

It should be noted this proposed provision provides the parties with an additional opportunity to agree on the selection of the arbitrator. The court should not interfere in the selection of the arbitrator if there is any possibility that the parties themselves will be able to make a selection.

### THE ARBITRATION PROCEEDINGS

The process of arbitration involves the presentation of evidence and argument by the parties, the consideration of the record by the arbitrator and the rendering of a decision embodied in an award. Aside from

<sup>82</sup> *Cathcart v. Security Title Ins. etc. Co.*, 66 Cal. App.2d 469, 152 P.2d 336 (1944).

<sup>83</sup> *Palestis v. Weber & Miller*, 161 Cal. App.2d 490, 327 P.2d 52 (1958).

<sup>84</sup> UNIFORM ARBITRATION ACT § 3.

<sup>85</sup> Howard, *Labor-Management Arbitration: "There Ought To Be a Law"—Or Ought There?*, 21 Mo. L. Rev. 1, 32 (1956).

these general characteristics there is no set procedure for an arbitration. As one arbitrator described it: "[A]rbitration can be highly personalized to suit the needs and temperaments of the parties who employ it. . . . Arbitration is . . . not a single, standard process, but a range of processes that may vary . . . from case to case."<sup>86</sup>

Regardless of the type of case, it is clear that the arbitrator need not follow the rules of evidence as applied in court unless the parties have agreed that he should and have directed him to do so.<sup>87</sup> Speaking of the arbitration process, Frances Kellor says: "It goes deep into the causes, sifts the facts and, unhampered by legal technicalities, sees that justice is administered."<sup>88</sup>

It is consistent with the theory of arbitration to leave the parties free to adopt any procedure they see fit. Since arbitration is a voluntary process for the settlement of disputes, it should not be burdened by unnecessary procedural requirements. On the other hand, where the parties fail to specify a particular procedure there should be some minimum statutory protection sufficient to safeguard a full and fair hearing. The following comments and recommendations concerning the existing procedural requirements in California are based on this premise.

## The Arbitrators

### Qualifications of the Arbitrators

Code of Civil Procedure Section 1283 prescribes the procedure for the appointment of arbitrators but the section has no requirements concerning who may be appointed as arbitrators. The parties may, of course, set out their own qualifications in the arbitration agreement, and if there is a breach of this agreement it is likely that the award would not be confirmed. A New York case construing a statute similar to Section 1283 held that an award will not be confirmed under these circumstances.<sup>88a</sup>

At common law arbitrators were required to be free from bias and interest in the subject matter of the arbitration.<sup>89</sup> Relationship by consanguinity or affinity to either party was presumed to create an interest in the outcome of the arbitration.<sup>90</sup>

There have been very few California cases concerning the qualifications of arbitrators. If the board is tripartite, complete disinterest on the part of all arbitrators does not appear to be essential under California law.<sup>91</sup>

A few states have set forth detailed qualifications for arbitrators in their statutes.<sup>92</sup> But the general rule under either statutory or common law arbitration is that anyone capable of acting in any other legal

<sup>86</sup> Shulman, *The Role of Arbitration in the Collective Bargaining Process*, COLLECTIVE BARGAINING AND ARBITRATION, 19, 24 (Institute of Industrial Relations, Univ. of Calif. 1949).

<sup>87</sup> *Sapp v. Barenfeld* 34 Cal.2d 515, 212 P.2d 233 (1949); *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal.2d 228, 174 P.2d 441 (1946).

<sup>88</sup> KELLOR, *ARBITRATION IN ACTION* 4 (1941).

<sup>88a</sup> *In the Matter of the Stanhold Co.*, N.Y.L.J. (Mar. 9, 1923).

<sup>89</sup> STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* 371-74 (1930).

<sup>90</sup> KELLOR, *ARBITRATION IN ACTION* 17 (1941); U.S. DEP'T OF LABOR, *LABOR ARBITRATION UNDER STATE STATUTES* 3 (1943).

<sup>91</sup> *Cecil v. Bank of America*, 107 Cal. App.2d 38, 236 P.2d 408 (1951). *Riccomini v. Pierucci*, 54 Cal. App. 606, 202 Pac. 344 (1921).

<sup>92</sup> For example, see Arizona, Texas, Louisiana, Massachusetts.

capacity may be appointed an arbitrator by the parties or by the court.<sup>93</sup> Various California statutes provide that public officials may serve as arbitrators under certain circumstances.<sup>94</sup>

The parties themselves are undoubtedly in the best position to determine the proper qualifications for their arbitrators. There seems to be no reason to change the present statutory rule on this matter.

#### Neutral and Party Arbitrators

When a tripartite arbitration board is appointed, it is usually composed of a representative of each of the contending parties and a third arbitrator chosen by the other two or by some other pre-determined procedure. The third arbitrator, who is the neutral arbitrator, often acts as the chairman of the board. In this type of arbitration board only the neutral arbitrator is an impartial party and an arbitrator in the usual sense. The arbitrators representing the parties frequently behave more like advocates than arbitrators. The practice of referring to "arbitrators" as including both the party arbitrators and the neutral arbitrators leads to confusion as to their functions and responsibilities. Section 5(c) of the Uniform Arbitration Act makes a distinction among the members of an arbitration board by designating the arbitrator chosen by both parties as a "neutral."

It is suggested that the California statute should distinguish the arbitrators by their titles. The arbitrator appointed by both parties, or by the two arbitrators chosen by the parties, or appointed by the court, or any other disinterested agency, should be designated the "neutral arbitrator" and should be given the duties and responsibilities of sending the required notices, administering oaths, issuing subpoenas and presiding at the hearing. The arbitrators representing the parties should be designated "party arbitrators." Such designations will clearly identify the role of each of the appointees.

#### Failure of Arbitrator To Act

A situation may arise in which there are three or more arbitrators and certain of the arbitrators fail to act or are unable to act. Under Section 1053 of the Code of Civil Procedure, where there is more than one arbitrator, all arbitrators must meet but a majority may do any act which might be done by all of them.<sup>95</sup>

In *Cecil v. Bank of America*,<sup>96</sup> the court, quoting *Corpus Juris Secundum*, stated:

[T]he refusal of one or a minority of a number of arbitrators, having authority to render a majority award, to proceed further with the hearing or discussion of the case, after a disagreement has arisen, does not divest the majority of power to proceed, in the absence of the minority, with the hearing and to render an award in accordance with their authority.<sup>97</sup>

<sup>93</sup> Feldman, *Arbitration Law in California: Private Tribunals for Private Government*, 30 SO. CAL. L. REV. 375, 448 (1957).

<sup>94</sup> CAL. AGRIC. CODE § 4009; CAL. LABOR CODE §§ 65, 1647.5; *Robinson v. Superior Court*, 35 Cal.2d 379, 387, 218 P.2d 10, 16 (1950).

<sup>95</sup> *Gerard v. Salter*, 146 Cal. App.2d 840, 304 P.2d 237 (1956).

<sup>96</sup> 141 Cal. App.2d 905, 297 P.2d 810 (1956).

<sup>97</sup> *Id.* at 911, 297 P.2d at 813-14.

In this case one of the arbitrators withdrew from the deliberations of the arbitrators; but the court held that the majority retained the power to make the award, relying upon the section cited above and a provision of the arbitration agreement which specifically stated that a decision of the majority would be conclusive.

The majority of arbitrators should be able to render a decision even though one arbitrator refuses to meet with them. If the majority cannot function as the entire board, then any minority member of the board not in sympathy with the decision of the majority could defeat the purpose of the arbitration agreement by refusing to meet with the other arbitrators. Such a result would certainly be contrary to the intention of the parties and to the spirit of the statute.

To avoid the failure of an arbitration it would be desirable to provide specifically in the statute that, unless otherwise provided in the agreement, the powers of arbitrators may be exercised by a majority of them if reasonable notice of all proceedings has been given to all the arbitrators. Except for the requirement for due notice to all arbitrators, this type of provision is included in the Uniform Arbitration Act.<sup>98</sup>

### The Hearing

At common law and under the California statute there seems to be an implicit assumption that a hearing will be a part of the arbitration process. Although the statute does not explicitly require a hearing, several sections include references to the hearing.<sup>99</sup> But the hearing may be more like an informal conference rather than a judicial trial so long as the hearing is conducted fairly.<sup>100</sup>

In arbitration practice the use of the term "hearing" may be misleading if it is too narrowly defined. The controlling element is not the physical presence of the parties at a particular meeting, but rather the opportunity for the parties to present their respective positions fully and fairly, both as to evidence and arguments. This may be accomplished in a variety of ways, and any means the parties agree to use constitutes the "hearing" whether or not it involves their physical presence at one location at a given time.

As a practical matter, in a great deal of commercial arbitration the parties may be located in widely separated geographical areas. The very reason for choosing arbitration as a means of settling their dispute is that it is a quick, efficient means of settling disputes without the necessity for physical appearance if the parties agree to present their evidence by written briefs. This method gives the parties an opportunity to be "heard." And it is the occasion for such a full and fair opportunity to be heard that really constitutes the required hearing.

### Notice of Hearing

Under the California statute of 1872, the Supreme Court held that notice of time and place of hearing was impliedly required and must be given to all interested parties.<sup>101</sup> But the courts have had little diffi-

<sup>98</sup> UNIFORM ARBITRATION ACT § 4.

<sup>99</sup> CAL. CODE CIV. PROC. §§ 1286, 1288.

<sup>100</sup> Sapp v. Barenfeld, 34 Cal.2d 515, 520, 212 P.2d 233, 237 (1949); Stockwell v. Equitable F. & M. Ins. Co., 134 Cal. App. 534, 25 P.2d 873 (1933).

<sup>101</sup> Curtis v. Sacramento, 64 Cal. 102, 28 Pac. 108 (1883).

culty in finding a waiver of this notice if all the parties were present and participated in the hearing, even though the submission agreement expressly provided for formal notices of all hearings.<sup>102</sup>

The present California statute has no express provision for notice of time and place of hearing. The Uniform Arbitration Act provides that notice of time and place of hearing shall be served personally or by registered mail not less than five days before the hearing, but that appearance at the hearing waives such notice.<sup>103</sup> Although arbitration agreements often provide for notice of time and place of hearing, it would be desirable to include this type of minimum requirement within the statute in the event the parties have not so agreed.

A clause similar to that of the Uniform Arbitration Act should be included in the California statute to require notice of the time and place of the hearing. It is suggested, however, that the time for notice be extended from the Uniform Arbitration Act time of five days to ten days because of the distances that may be involved in California.

### Ex Parte Investigations

The California statute contains no provision concerning the taking of evidence or the securing of opinions by the arbitrator outside the presence of the parties. But in *Sapp v. Barenfeld*<sup>104</sup> the Supreme Court stated that, although a hearing is required on disputed questions of fact, arbitrators may inform themselves further by privately consulting price lists, examining materials and receiving cost estimates. The court held that this type of investigation is proper if the following standards are met:

1. The evidence must be obtained only from disinterested experts.
2. It must be on a relevant, technical question.
3. The award itself must be the result of the arbitrator's own judgment.

A later decision, *Griffith Co. v. San Diego Col. for Women*,<sup>105</sup> which involved an ex parte investigation by the chairman of a three-man board, followed the *Sapp* decision. It has been argued that this rule on ex parte investigations is implicit in the nature of the arbitration process, for "the arbitration process is used because of the expertise of the umpire. As this broadens, the area of 'judicial notice' expands, a condition usually desired by the disputants."<sup>106</sup> Even if this somewhat doubtful assumption is accepted, it can still be argued that the parties do not ordinarily contemplate the taking of evidence outside their presence. If they do contemplate this they can certainly agree to it, and the courts will abide by the agreement.

But the informality of the arbitration process should not be so enlarged that parties may be unaware of portions of the record which the arbitrator used as a basis for his decision:

If the arbitrator relies extensively on his own knowledge or even on the opinions of disinterested persons which are not known to the

<sup>102</sup> *Sapp v. Barenfeld*, 34 Cal.2d 515, 520, 212 P.2d 233, 237 (1949).

<sup>103</sup> UNIFORM ARBITRATION ACT § 5 (a).

<sup>104</sup> 34 Cal.2d 515, 520, 212 P.2d 233, 237 (1949).

<sup>105</sup> 45 Cal.2d 501, 289 P.2d 476 (1955).

<sup>106</sup> Feldman, *Arbitration Law in California: Private Tribunals for Private Government*, 30 So. CAL. L. REV. 375, 456 (1957).

parties, one or both of the parties is denied in effect the right of rebuttal and cross-examination. This can be of great importance since an opportunity to rebut or cross-examine might nullify the applicability of the arbitrator's knowledge or that of experts in the particular case.<sup>107</sup>

In the *Griffith* case Mr. Justice Edmonds, in criticizing the majority holding, stated:

To hold that one arbitrator, unknown to his associates, may seek the advice of an attorney and then use the opinion prepared by that attorney as the award of the arbitrators violates every principle of fair trial. If arbitration is to have the place in the administration of justice to which it is entitled, it must be conducted in accordance with the same rules of law which apply to judicial proceedings, insofar as the integrity of decision is concerned.<sup>108</sup>

Therefore, it is recommended that California include in its statute a provision overruling the holdings in the *Sapp* and *Griffith* cases on ex parte consultations. Of course, if the parties consent to this type of investigation, then there can be no real objection to it. And they can so provide in their arbitration agreement.

The author proposes the following amendment to the statute to cover this problem:

The neutral arbitrator shall not obtain information, advice or other data while outside the presence of the parties without disclosing such intention to all parties to the arbitration and obtaining their consent thereto, except that an arbitrator may take judicial notice of such subjects as are permitted by law.

### The Oath

Under the California statute it is not necessary that the arbitrator be sworn. Nor is it necessary that the witnesses testify under oath. Code of Civil Procedure Section 1286 authorizes the administering of oaths to witnesses but it is not mandatory. The arbitrator is given the power to administer the oath to the witness if he chooses to do so or if the parties request him to do so. If the parties do not request him to do so, it is assumed that they waive any right they may have to require that witnesses be placed under oath.<sup>109</sup>

At common law oaths were not required of either arbitrator or witnesses,<sup>110</sup> but the statutes of some states require oaths to be administered in arbitration proceedings.<sup>111</sup> In New York, although the statute requires that the arbitrator take an oath, it is clear that the requirement is waived when the parties proceed with the arbitration without objecting to the failure of the arbitrator to take the oath.<sup>112</sup> The rules of procedure of some trade associations and arbitration associations require that oaths be taken.<sup>113</sup> The Uniform Arbitration Act<sup>114</sup> takes

<sup>107</sup> Kagel, *Labor and Commercial Arbitration Under The California Arbitration Statute*, 38 CALIF. L. REV. 799, 823 (1950).

<sup>108</sup> *Griffith Co. v. San Diego Col. for Women*, 45 Cal.2d 501, 517, 289 P.2d 476, 485 (1955).

<sup>109</sup> *Rives-Strong Bldg. v. Bk. of America*, 50 Cal. App.2d 810, 123 P.2d 942 (1942).

<sup>110</sup> U.S. DEP'T OF LABOR, LABOR ARBITRATION UNDER STATE STATUTES 3 (1943).

<sup>111</sup> *Id.* at 13.

<sup>112</sup> KELLOR, ARBITRATION IN ACTION 90 (1941).

<sup>113</sup> For example, American Arbitration Association.

<sup>114</sup> UNIFORM ARBITRATION ACT § 5 (a).

essentially the same position as that taken in the California statute: oaths are authorized but not required.

There are some who believe that the taking of an oath by a witness in an arbitration proceeding lends dignity to the proceeding and has a positive effect on the witness's tendency to give truthful testimony. There is, however, no reason to change the settled law in California on the matter of oaths. Under the present statute, the arbitrator has the authority to administer the oath if the parties so desire. And if the parties wish they may require in their submission agreement that the arbitrator take an oath.

### **Representation by Counsel**

There is nothing in the California statutes dealing with the right of an individual to be represented by counsel at an arbitration proceeding. A California case held that a party was not prejudiced when the arbitrators refused to continue the hearing to permit his attorney to be present, but the court avoided a decision on the basic issue of whether or not a party has the right to have counsel present.<sup>115</sup>

This problem usually arises in terms of waiver of counsel. There are some trade associations that include within their arbitration rules a waiver of the right to be represented by an attorney. If the arbitration agreement incorporates these rules by reference the parties may unwittingly waive their right to counsel. The Commissioners on Uniform State Laws have met this problem with Section 6 of the Uniform Arbitration Act, which provides that a waiver of right to counsel prior to the proceeding or hearing is ineffective.

The New York Civil Practice Act was amended in 1952 to provide that there is no effective waiver of the right to counsel unless the waiver is in writing and signed by the party requesting representation or unless the party fails to assert his right to counsel at the beginning of the hearing.<sup>116</sup> In 1955 this section was changed to require the written waiver to be signed by the party to be charged therewith and to limit it to existing controversies. The waiver by failure to assert it at the beginning was deleted.<sup>117</sup> Of course, a general waiver is possible if the party continues with the proceedings with knowledge of the fact or defect.<sup>118</sup>

The California statute should be amended to include the type of protection provided in the Uniform Arbitration Act to parties who may incorporate the rules of an association on arbitration in their agreement by reference.

### **Presentation of Evidence**

Section 1286 of the Code of Civil Procedure provides that the arbitrators have the power to hear the allegations and evidence of the parties and to make an award thereon. Decisions prior to the 1927 statute held that a fair hearing included the opportunity for the parties to an arbitrator to present their cases, to counter the case of the other side,<sup>119</sup> and to introduce evidence in support of their claims.<sup>120</sup>

<sup>115</sup> *Moore v. Griffith*, 51 Cal. App.2d 386, 124 P.2d 900 (1942).

<sup>116</sup> N.Y. CIV. PRAC. ACT § 1454(1).

<sup>117</sup> N.Y. Laws 1955, ch. 261, at 797.

<sup>118</sup> N.Y. CIV. PRAC. ACT § 1458(1).

<sup>119</sup> *Christenson v. Cudahy Pack. Co.*, 198 Cal. 685, 247 Pac. 207 (1926).

<sup>120</sup> *Meloy v. Imperial Land Co.*, 163 Cal. 99, 124 Pac. 712 (1912).

Case law has clearly established the principle that formal rules of evidence do not apply in arbitration proceedings. The arbitrator has the discretion to determine both the admissibility and the weight of the evidence offered. The Supreme Court has held that "all relevant evidence may be freely admitted and rules of judicial procedure need not be observed so long as the hearing is fairly conducted."<sup>121</sup>

The merits of the award made in arbitration proceedings may not be reviewed either as to questions of law or of fact except as provided by statute.<sup>122</sup> Nor may the questions of fact and of law and the sufficiency of evidence to sustain an arbitration award under a general submission agreement be reviewed by the courts.<sup>123</sup>

The Uniform Arbitration Act provides that the parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.<sup>124</sup> This represents a codification of existing law in California and should be included in the California statute. If such a provision is added to the California statute, it might be well to add a statement to the provision to make it clear that the provision is not intended to change the existing rule that rules of evidence and rules of judicial procedure need not be observed so long as the hearing is fairly conducted.

### Witnesses, Depositions and Subpoenas

To assure the arbitrator sufficient power to obtain necessary testimony and evidence he should be given the right to subpoena witnesses, take depositions, secure documents or written instruments and administer oaths. The arbitrator has these powers under Section 1286 of the Code of Civil Procedure. Section 7 of the Uniform Arbitration Act also grants these powers to the arbitrators.

One of the amendments proposed above is that the arbitrators be designated as either neutral arbitrators or party arbitrators in the event that there is a board of arbitration.<sup>125</sup> Powers granted by the existing statute to the arbitrator should be extended only to the neutral arbitrator. These powers are very similar to the powers of a judge. Under the present statute, where there is a board of arbitration a majority of the board may exercise the power. While this would usually assure that the neutral arbitrator would have to concur, it would seem far better to provide specifically that these quasi-judicial powers are not extended to the party arbitrators.

Section 1286 of the Code of Civil Procedure also provides that if a person summoned to testify fails to obey the subpoena, then, upon petition, the superior court of the county in which the arbitration is being heard may compel the attendance of such person before the arbitrators. Failure to observe the court order can result in punishment for contempt in the same manner that a witness ordered to appear in the courts of this State may be punished for contempt if he

<sup>121</sup> *Sapp v. Barenfeld*, 34 Cal.2d 515, 520, 212 P.2d 233, 237 (1949).

<sup>122</sup> *Cecil v. Bank of America*, 142 Cal. App.2d 249, 298 P.2d 24 (1956); *Crofoot v. Blair Holdings Corp.*, 119 Cal. App.2d 156, 260 P.2d 156 (1953); *Riley v. Pig'n Whistle Candy Co.*, 109 Cal. App.2d 650, 241 P.2d 294 (1952).

<sup>123</sup> *Los Angeles Local etc. Bd. v. Stan's Drive-Ins, Inc.*, 136 Cal. App.2d 89, 288 P.2d 286 (1955).

<sup>124</sup> UNIFORM ARBITRATION ACT § 5(b).

<sup>125</sup> See text at G-42 *supra*.



fails to appear. The Uniform Arbitration Act also provides a procedure for the enforcement of a subpoena.<sup>126</sup>

Both the Uniform Arbitration Act<sup>127</sup> and the California statute<sup>128</sup> provide for witness fees.

Section 1286 of the Code of Civil Procedure is somewhat unclear on the power of the arbitrators in regard to depositions. The first sentence states that arbitrators "shall have power to approve the taking of depositions," but the second sentence states that "upon petition approved by the arbitrators or by a majority of them, the superior court of the county or city and county in which said arbitrators are sitting, may direct the taking of depositions to be used as evidence before the arbitrators." The statute is not clear whether the arbitrators must file a petition with the court in every instance that a deposition is sought, or whether such a petition must be filed only when there is a refusal to cooperate in the taking of depositions. There is no case law in California on this point.

It would seem desirable for the California statute to state clearly that the arbitrator has the power to order the taking of (not merely approve the taking of) depositions. Such a provision would remove the confusion in the present section. Then if a person refuses to cooperate, resort should be had to the courts.

The purpose for which the deposition may be used has caused some concern among those involved in arbitrations. In the 1955 discussions of the proposed Uniform Arbitration Act by the Commissioners on Uniform State Laws, the Chairman of the Committee on the Uniform Arbitration Act said:

[I]t would be most unwise and inappropriate in an arbitration proceeding to permit the taking of depositions, not to obtain testimony of someone outside the state, but for discovery purposes of the parties.<sup>129</sup>

In order to avoid the use of depositions for discovery purposes, the Uniform Arbitration Act permits the parties to take the depositions of only those witnesses who cannot be subpoenaed or who are unable to attend the hearing. Although there have been no cases deciding the question, Section 1286 of the Code of Civil Procedure apparently carries this restriction, for it speaks of depositions to be used as evidence before the arbitrators. The limiting phrase in the Uniform Arbitration Act "for use of evidence" would undoubtedly afford better protection to the parties against the use of depositions for discovery.

Section 1286 does not indicate whether the arbitrator may on his own initiative request a deposition. The Uniform Arbitration Act provides that the arbitrators may permit a deposition to be taken on application of a party. The present California section on depositions is confusing, and it does not adequately handle the use of depositions for discovery purposes. It is recommended that the present section be replaced by a provision comparable to Section 7 of the Uniform Arbitration Act. However, such a provision should limit the right to issue orders for the taking of depositions to the neutral arbitrator.

<sup>126</sup> UNIFORM ARBITRATION ACT § 7.

<sup>127</sup> *Ibid.*

<sup>128</sup> CAL. CODE CIV. PROC. § 1286.

<sup>129</sup> 1955 UNIFORM ARBITRATION ACT PROCEEDINGS at 31.

Section 1286 also gives the arbitrator the right to issue a subpoena to require the attendance of a witness and to direct a witness in a proper case to bring with him any books or written instruments under his control. Although there are no cases on the question, presumably a subpoena *duces tecum* to compel the production of books and papers should be issued by an arbitrator in accordance with Section 1985 of the Code of Civil Procedure. Under that section known and identified papers must be produced but must be material and relevant to the issue.<sup>130</sup> This requirement prevents the use of the subpoena *duces tecum* for the purpose of a "fishing expedition" and would, for example, prevent the use of a subpoena *duces tecum* to force an employer to produce financial records in a case in which his financial ability to meet the demands of the union is irrelevant.

Recognizing that some arbitrators are not conversant with the Code of Civil Procedure, it is recommended that the section on subpoenas be revised to state specifically that subpoenas shall be issued in accordance with the provisions of Section 1985 of the Code of Civil Procedure. Such a revision will at least put the arbitrators and the parties on notice that there are standards set out elsewhere in the code which must be applied.

### Making the Award

An award has been defined by a District Court of Appeal as "the determination of the issue presented for arbitration."<sup>131</sup> The present California arbitration statute does not include any procedure for rendering an award except the provision in Code of Civil Procedure Section 1287 that the award must be in writing and acknowledged or proved in the same manner as a deed for the conveyance of real estate if the award is to be confirmed. Thus, the statute requires that the award be in writing only if the parties bring an action to confirm the award. Absent such an action, an arbitration award is not invalid simply because it is not reduced to writing. The general practice, however, is to render the award in writing and to deliver it to the parties or their attorneys. The present statute does not contain any general requirement concerning delivery of the award to the parties, but Section 1287 does specify that if there is a motion to confirm the award the award must have been delivered to one of the parties or his attorneys. However, a recent District Court of Appeal decision held that an award is not rendered until the arbitrator has signed it and notified the parties, thus placing it out of his power to recall or alter it.<sup>132</sup>

There is no requirement that the arbitrator set forth his findings of fact or state his reasons.<sup>133</sup> Nor does the present statute have a time limit within which an award must be rendered. The parties in their arbitration agreement often fix the time within which the arbitrator must make his award, and this time limit will be enforced by the court unless the parties have waived it.<sup>134</sup> If the arbitrator attempts to issue

<sup>130</sup> McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944 (1945); Union Trust Co. v. Superior Court, 11 Cal.2d 449, 81 P.2d 150 (1938).

<sup>131</sup> Bierlein v. Johnson, 73 Cal. App.2d 728, 735, 166 P.2d 644, 648 (1946).

<sup>132</sup> Rusnak v. General Controls Co., 183 A.C.A. 605, 7 Cal. Rptr. 71 (1960).

<sup>133</sup> Sapp v. Barenfeld, 34 Cal.2d 515, 212 P.2d 233 (1949); Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal.2d 228, 174 P.2d 441 (1946).

<sup>134</sup> Willis F. & C. Co. v. Porter, 88 Cal. App. 523, 263 Pac. 842 (1928).

an award after the expiration of the time limit and the parties have not waived the time limit, the award will be held void because the arbitrator's authority ceases upon the expiration of the stated time limit. And since he has no authority to render an award after the expiration of the time limit he is also without authority to alter or correct the award.<sup>135</sup>

The rendering of the award and the proper communication of it to the parties is the final goal of the arbitration process. Because of this it seems highly desirable that some minimum procedural standards be specified in the statute concerning the making of the award. These minimum standards should include the following requirements:

- (1) The award shall be in writing and signed by the arbitrator or arbitrators concurring therein.
- (2) The award shall include a determination of all of the issues submitted to the arbitrator or arbitrators.
- (3) The arbitrator or arbitrators shall deliver a copy of the award to each party personally or by registered mail or as provided in the arbitration agreement.

All of these requirements are set forth in Section 8 of the Uniform Arbitration Act. These requirements would not make a substantial change in existing case law in California.

Arbitration is often used by the parties to achieve a speedy settlement of the dispute. This end may be defeated if the parties have failed to fix a time limit for the rendering of awards in their agreement. The present statute does not set a time limit and case law does not indicate that a court may set its own time limit. It is recommended that the statute include a provision giving the court power to fix the time within which the award must be made on the motion of a party to the arbitration.

It would also be desirable to codify existing case law to the effect that the parties may extend the time for the rendering of arbitration award either before or after the expiration of that time limit. To give protection against a casual waiver of this time limit the statute should specify that the extension be in writing. The statute should also provide that a party waives the objection that the award was not made within the time limit unless he notifies the arbitrator of his objection in writing prior to the delivery of the award to him. Section 8(b) of the Uniform Arbitration Act provides such rules in connection with time limits on awards.

### Default Awards

In some jurisdictions if a party to an arbitration is given reasonable notice of the time and place of hearing but still absents himself, the arbitrator may hear the evidence presented by the party present and render an award.<sup>136</sup> To deprive one party of the power to frustrate the arbitration agreement by refusing to appear, the arbitrator should be allowed to proceed to hear the evidence presented by the party who does participate and to issue an award on the basis of the evidence presented. The authority to issue default awards is not granted by

<sup>135</sup> *Jannis v. Ellis*, 149 Cal. App.2d 751, 308 P.2d 750 (1957).

<sup>136</sup> *STURGES, COMMERCIAL ARBITRATIONS AND AWARDS* 442 (1930).

either the California statute or by case law. However, Section 5(a) of the Uniform Arbitration Act includes a default award provision.

Before a default award is issued the nondefaulting party should have done everything within his power to obtain the appearance of the other party. It would not be unreasonable to require that the nondefaulting party first obtain a court order directing the reluctant party to arbitrate. If there is a failure thereafter to participate in the arbitration, the nondefaulting party should be permitted to participate in a default arbitration proceeding and the arbitrator should be permitted to issue a default award. It is recommended that the California statute be amended accordingly.

### **Modification or Correction of Award by Arbitrator**

The arbitrator's power terminates upon the rendition of the award.<sup>137</sup> Unless the parties agree to a new submission to the arbitrator, there is no method under present California law by which the arbitrator can obtain the authority to correct technical errors. Of course one of the parties may bring a motion to correct or modify the award under Section 1289 of the Code of Civil Procedure, but this requires the use of court procedure with its delays and expense for a matter which could be handled easily by the arbitrator without prejudicing the rights of either party.

If the power to correct technical errors is given to the arbitrator it should be properly limited in scope to avoid possible abuse and should include strict time limits to preclude undue delay in achieving finality of the award. The arbitrator should be given the power to modify or correct an award in the following situations only:

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

These are two of the three grounds upon which a court may correct or modify an award on a motion brought under Section 1289. Both are technical grounds which do not involve the basic merits of the award.

Time limits should be shorter than those allowed for court modification. There should be a requirement that the application to the arbitrator for correction or modification be made within ten days after delivery of the award, and the other party should be required to serve his objections to the application within five days after notice of the application. Then the arbitrator should have not more than ten days within which to make any modification or correction. Time limits such as these would not increase the total time for attack on the award, but would provide an efficient method for correcting technical errors without requiring recourse to the courts. At the same time the right to judicial review of a failure to modify or correct would be preserved.

Section 9 of the Uniform Arbitration Act contains provisions similar to those proposed above. There are minor differences in the time limits, and the scope of the arbitrator's authority under the Uniform Arbitra-

<sup>137</sup> *Jannis v. Ellis*, 149 Cal. App.2d 751, 308 P.2d 750 (1957).

tion Act is somewhat broader than suggested above. Under the Uniform Arbitration Act, in addition to the two specified grounds for correction, the arbitrator may change the award for the "purpose of clarifying the award." Such a vaguely defined power raises serious policy questions. "Clarification" is open to a great range of interpretation. It is therefore recommended that power be granted to the arbitrator to modify or correct the award and that this power be strictly limited to the specified grounds discussed above.

### Costs

The 1851 California arbitration statute did not have any provision dealing with the arbitrator's right to award costs. Nor is any such provision found in the existing arbitration statute. However, an 1863 decision held that the arbitrator has the authority to award costs, even though this question may not have been submitted to him for decision, if there is nothing in the agreement between the parties concerning the allocation of costs.<sup>138</sup> Subsequently an 1884 decision held that an award of the costs of the proceedings to the prevailing parties is not valid if it is not provided for expressly or impliedly in the arbitration agreement.<sup>139</sup> But apparently it is not difficult to find an implication that the arbitrator has the power to award costs: in a recent case there was a clause for the settlement by arbitration of all questions as to the rights and obligations arising under the terms of the agreement, the court held that the clause granted the arbitrators power to award the costs in any manner they saw fit.<sup>140</sup>

Of course, the parties may provide for allocation of costs in their agreement in any manner they desire, and the general practice is to include a provision for division of the costs of arbitration, other than counsel fees, in the arbitration agreement. Agreements usually provide that one-half of the costs is to be paid by one party and one-half by the other party.

Section 10 of the Uniform Arbitration Act provides:

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

Thus, in effect, Section 10 makes costs an arbitrable issue and something upon which the arbitrator may rule.

In view of the widespread practice of dividing the costs of arbitration equally, it is recommended that the California statute be amended to provide that 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 fees, incurred in the conduct of the arbitration, unless the parties by agreement specifically provide otherwise. A provision of this nature would be more desirable than leaving the division of costs to the discretion of the arbitrator.

<sup>138</sup> *Dudley v. Thomas*, 23 Cal. 365 (1863).

<sup>139</sup> *Springer v. Schultz*, 64 Cal. 454, 2 Pac. 32 (1884).

<sup>140</sup> *Sampson Motors, Inc. v. Roland*, 121 Cal. App.2d 491, 263 P.2d 445 (1953).

## POST-AWARD JUDICIAL PROCEEDINGS

## Judicial Review of the Award

Sections 1287, 1288, 1289 and 1290 of the Code of Civil Procedure provide that judicial review of the arbitration award may be obtained by one or more of the following motions:

- (1) A motion to confirm.
- (2) A motion to modify or correct.
- (3) A motion to vacate.

These code sections are not independent of each other and should be read together to determine their effect on any particular action on the award.

To some extent all of these motions call for court review. The motion to confirm is essentially a request for enforcement of the award, but it may serve to raise an issue as to validity of the award if the confirmation is contested. The other motions clearly call for court review.

Nothing in the California statute defines the permissible scope of review by the courts. Numerous court rulings have, however, developed the following basic principles which set the limits for any court review:

- (1) Every presumption favors an award by arbitrators.<sup>141</sup>
- (2) Merits of an arbitration award either on questions of fact or of law may not be reviewed except as provided for in the statute in the absence of some limiting clause in the arbitration agreement.<sup>142</sup>
- (3) Unless specifically required to act in conformity with rules of law, arbitrators may base their decisions on broad principles of justice and equity and in doing so may expressly or impliedly reject a claim that a party might have asserted in a judicial action.<sup>143</sup>
- (4) The form and sufficiency of the evidence to support an award of arbitrators, and the credibility and good faith of the parties are not matters for judicial review.<sup>144</sup>

<sup>141</sup> Crofoot v. Blair Holdings Corp., 119 Cal. App.2d 156, 260 P.2d 156 (1953); Griffith Co. v. San Diego Col. for Women, 45 Cal.2d 501, 289 P.2d 476 (1955); and see Wetsel v. Garibaldi, 159 Cal. App.2d 4, 323 P.2d 524 (1958); Straus v. North Hollywood Hosp., Inc., 150 Cal. App.2d 306, 309 P.2d 541 (1957); Downer Corp. v. Union Paving Co., 146 Cal. App.2d 708, 304 P.2d 756 (1956); Sampson Motors, Inc. v. Roland, 121 Cal. App.2d 491, 263 P.2d 445 (1953); Drake v. Stein, 116 Cal. App.2d 779, 254 P.2d 613 (1953); Riley v. Pig'n Whistle Candy Co., 109 Cal. App.2d 650, 241 P.2d 294 (1952); Popcorn Equipment Co. v. Page, 92 Cal. App.2d 448, 207 P.2d 647 (1949).

<sup>142</sup> O'Malley v. Petroleum Maintenance Co., 48 Cal.2d 107, 308 P.2d 9 (1957); Wetsel v. Garibaldi, 159 Cal. App.2d 4, 323 P.2d 524 (1958); Straus v. North Hollywood Hosp., Inc., 150 Cal. App.2d 306, 309 P.2d 541 (1957); Gerard v. Salter, 146 Cal. App.2d 840, 304 P.2d 237 (1956); Cecil v. Bank of America, 141 Cal. App.2d 905, 297 P.2d 810 (1956); Los Angeles Local etc. Bd. v. Stan's Drive-Ins, Inc., 136 Cal. App.2d 89, 288 P.2d 286 (1955); Flores v. Barman, 130 Cal. App.2d 282, 279 P.2d 81 (1955); United States Plywood Corp. v. Hudson Lumber Co., 124 Cal. App.2d 527, 269 P.2d 93 (1954); Crofoot v. Blair Holdings Corp., 119 Cal. App.2d 156, 260 P.2d 156 (1953); Riley v. Pig'n Whistle Candy Co., 109 Cal. App.2d 650, 241 P.2d 294 (1952).

<sup>143</sup> Griffith Co. v. San Diego Col. for Women, 45 Cal.2d 501, 289 P.2d 476 (1955).

<sup>144</sup> Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal.2d 228, 174 P.2d 441 (1946); Los Angeles Local etc. Bd. v. Stan's Drive-Ins, Inc., 136 Cal. App.2d 89, 288 P.2d 286 (1955); Sampson Motors, Inc. v. Roland, 121 Cal. App.2d 491, 263 P.2d 445 (1953).

- (5) Statutory provisions for a review of arbitration proceedings are for the sole purpose of preventing misuse of the proceedings where corruption, fraud, misconduct, gross error or mistake has been carried into the award to the substantial prejudice of a party to the proceedings.<sup>145</sup>

Both the agreement between the parties that the award shall be final and binding and the statutory treatment of arbitration agreements suggest that the ordinary concepts of judicial appeal and review are not applicable to arbitration awards. Settled case law is based on this assumption.

Neither the Uniform Arbitration Act nor other state statutes attempt to express the exact limits of court review of arbitration awards. And no good reason exists to codify into the California statute the case law as it presently exists.

### Grounds for Modification or Correction of Award

The grounds for modification or correction of the award are set forth in Code of Civil Procedure Section 1289. They are:

- (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 arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

If the mistake appears on the face of the record the court will correct it.<sup>146</sup> The fact that the arbitration award embraces matters not submitted is a ground for modification.<sup>147</sup> The award will be modified by striking out the invalid portions if the remaining portions make a final and definite award on the matters submitted.<sup>148</sup>

In its correction of the award the court may add to the award if the addition is clearly within the intention of the arbitrators.<sup>149</sup>

### Grounds for Vacating the Award

Section 1288 of the Code of Civil Procedure sets forth the grounds upon which a court may vacate an arbitration award:

- (a) Where the award was procured by corruption, fraud or undue means.
- (b) Where there was corruption in the arbitrators, or either of them.
- (c) Where the arbitrators were 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

<sup>145</sup> *Accito v. Matmor Canning Co.*, 128 Cal. App.2d 631, 276 P.2d 34 (1954).

<sup>146</sup> *Carsley v. Lindsay*, 14 Cal. 390 (1859).

<sup>147</sup> *Doyle v. Hunt Construction Co.*, 123 Cal. App.2d 51, 266 P.2d 152 (1954).

<sup>148</sup> *In re Connor*, 128 Cal. 279, 60 Pac. 862 (1900).

<sup>149</sup> *Los Angeles Local etc. Bd. v. Stan's Drive-Ins, Inc.*, 136 Cal. App.2d 89, 288 P.2d 286 (1955).

of any other misbehaviors, by which the rights of any party have been prejudiced.

- (d) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made.

Insofar as court review of the arbitration proceedings is necessary to determine the existence of these grounds, the general presumptions concerning the arbitration award and the permissible scope of court review are applicable.

Since every presumption is in favor of the award,<sup>150</sup> the party objecting to the award has an affirmative duty to prove the asserted grounds for vacating the award.<sup>151</sup>

It has been held that any conduct which amounts to fraud or which deprives either party of a fair and impartial hearing to his substantial prejudice may be grounds for setting aside the award.<sup>152</sup> But misconduct of arbitrators will not be found in a departure from usual arbitration procedure unless the departure has prejudiced the rights of the complaining party.<sup>153</sup> Even a gross error or mistake in an arbitrator's judgment is not sufficient grounds for vacation, unless the error amounts to actual or constructive fraud.<sup>154</sup> If a party seeks to vacate an award on the grounds that the arbitrator refused to hear evidence, the objecting party must show that the evidence was competent and material.<sup>155</sup> Arbitrators are not guilty of misconduct in refusing to postpone a meeting when one of the arbitrators is absent where the meeting was not a hearing but merely a meeting to execute the formal award.<sup>156</sup> There is dicta to the effect that if an arbitrator's decision is not really his own but rather one which he accepts from some outside person, the award may be set aside on the basis of the arbitrator's misconduct.<sup>157</sup> Ordinarily an arbitrator may not testify to his own fraud or misconduct.<sup>158</sup>

If an arbitrator exceeds his powers the award will be vacated.<sup>159</sup> But arbitrators do not exceed their powers because of an erroneous reason for their decision,<sup>160</sup> or because their reasoning is unsound in reaching a conclusion.<sup>161</sup> An arbitrator's powers are limited and circumscribed by the arbitration agreement.<sup>162</sup> If the submission agreement does not authorize a cash award, the arbitrator exceeds his authority if he makes a cash award,<sup>163</sup> but damages may be included in

<sup>150</sup> See note 141 *supra*.

<sup>151</sup> *Kerr v. Nelson*, 7 Cal.2d 85, 59 P.2d 821 (1936).

<sup>152</sup> *Stockwell v. Equitable F. & M. Ins. Co.*, 134 Cal. App. 534, 25 P.2d 873 (1933).

<sup>153</sup> *Pacific Vegetable Oil Corp. v. C.S.T., Ltd.*, 29 Cal.2d 228, 174 P.2d 441 (1946);

*Popcorn Equipment Co. v. Page*, 92 Cal. App.2d 448, 207 P.2d 647 (1949).

<sup>154</sup> *Lundblade v. Continental Ins. Co.*, 74 F.Supp. 795 (N.D. Cal. 1947).

<sup>155</sup> *Moore v. Griffith*, 51 Cal. App.2d 386, 124 P.2d 900 (1942).

<sup>156</sup> *Downer Corp. v. Union Paving Co.*, 146 Cal. App.2d 708, 304 P.2d 756 (1956).

<sup>157</sup> *Sapp v. Barenfeld*, 34 Cal.2d 515, 212 P.2d 233 (1949).

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ulene v. Murray Millman of California*, 175 Cal. App.2d 655, 346 P.2d 494 (1959);

*Flores v. Barman*, 130 Cal. App.2d 282, 279 P.2d 81 (1955); *Drake v. Stein*, 116

Cal. App.2d 779, 254 P.2d 613 (1953).

<sup>160</sup> *Grunwald-Marx, Inc. v. Los Angeles Joint Board*, 52 Cal.2d 568, 343 P.2d 23

(1959); *O'Malley v. Petroleum Maintenance Co.*, 48 Cal.2d 107, 308 P.2d 9

(1957).

<sup>161</sup> *Firestone Tire & Rubber Co. v. United Rubber Workers*, 168 Cal. App.2d 444, 335

P.2d 990 (1959).

<sup>162</sup> *Pac. Fire etc. Bureau v. Bookbinders' Union*, 115 Cal. App.2d 111, 251 P.2d 694

(1952).

<sup>163</sup> *Bierlein v. Johnson*, 73 Cal. App.2d 728, 166 P.2d 644 (1946).



the award, even though the issue of damages has not been specifically submitted to the arbitrators.<sup>164</sup> If the agreement provides that awards shall not be in conflict with the express provisions of the collective bargaining agreement then the arbitrator exceeds his authority if he defines terms differently from the express provisions set forth in that agreement.<sup>165</sup> If the agreement provides a time within which the award must be rendered, an award made thereafter is a nullity.<sup>166</sup>

Arbitrators may base their decision on broad principles of justice and equity,<sup>167</sup> but if the submission agreement specifically requires an arbitrator to act in conformity with rules of law, the arbitrator exceeds his authority if his decision is not based on rules of law.<sup>168</sup>

An arbitrator also exceeds his authority if he attempts to render an award on the basis of an illegal agreement<sup>169</sup> or if he attempts to decide the legality of an arbitration agreement.<sup>170</sup>

According to a recent California decision an arbitrator has no power to render a valid award which is contrary to public policy.<sup>171</sup>

If the arbitrator fails to make a decision on all the issues submitted; so that a mutual, final and definite award on the subject matter submitted is not made, there is no award, and the attempted award must be vacated.<sup>172</sup> But it is presumed that all matters within the submission agreement were laid before the arbitrators and passed on by them.<sup>173</sup> An arbitrator may testify as to the matters which he did consider in making his award.<sup>174</sup> The arbitration award is sufficient if it is clear and precise and gives results of accounts between the parties even though it does not detail the process by which the result was reached.<sup>175</sup>

Section 12 of the Uniform Arbitration Act includes as grounds for vacating an award all those set forth in the California statute with the exception of failure to make a "mutual, final and definite award, on the subject matter submitted."<sup>176</sup>

Section 12 also includes another ground for vacating an award which is not included in the California statute. Section 12(a)(5) of the Uniform Arbitration Act provides that the court shall vacate an award where there was no arbitration agreement, the issue was not adversely determined in a previous proceeding, and the party did not participate in the arbitration hearing without raising the objection. Although this ground is not expressly stated in the California statute, if there is no agreement to arbitrate, the award is a nullity. Undoubtedly the California courts would treat such an award in the same manner as an award rendered pursuant to an illegal agreement. The award would

<sup>164</sup> *Grunwald-Marx, Inc. v. Los Angeles Joint Board*, 52 Cal.2d 568, 343 P.2d 23 (1959).

<sup>165</sup> *Screen etc. Guild v. Walt Disney Prod.*, 74 Cal. App.2d 414, 168 P.2d 983 (1946).

<sup>166</sup> *Rusnak v. General Controls Co.*, 183 A.C.A. 605, 7 Cal. Rptr. 71 (1960); *Willis F. & C. Co. v. Porter*, 88 Cal. App. 523, 263 Pac. 842 (1928).

<sup>167</sup> *Grunwald-Marx, Inc. v. Los Angeles Joint Board*, 52 Cal.2d 568, 343 P.2d 23 (1959).

<sup>168</sup> *Utah Const. Co. v. Western Pac. Ry. Co.*, 174 Cal. 156, 162 Pac. 631 (1916).

<sup>169</sup> *Loving & Evans v. Blick*, 33 Cal.2d 603, 204 P.2d 23 (1949).

<sup>170</sup> *Ibid.*

<sup>171</sup> *Black v. Cutter Laboratories*, 43 Cal.2d 788, 278 P.2d 905, cert. granted, 350 U.S. 816, cert. denied, 350 U.S. 1012 (1955).

<sup>172</sup> *Pierson v. Norman*, 2 Cal. 599 (1852); *Film Technicians v. Color Corp. America*,

141 Cal. App.2d 553, 297 P.2d 86 (1956).

<sup>173</sup> *Crofoot v. Blair Holdings Corp.*, 119 Cal. App.2d 156, 260 P.2d 156 (1953).

<sup>174</sup> *Griffith Co. v. San Diego Col. for Women*, 45 Cal.2d 501, 239 P.2d 476 (1955).

<sup>175</sup> *Sampson Motors, Inc. v. Roland*, 121 Cal. App.2d 491, 263 P.2d 445 (1953); *Pop-*

*corn Equipment Co. v. Page*, 92 Cal. App.2d 448, 207 P.2d 647 (1949).

<sup>176</sup> CAL. CODE CIV. PROC. § 1288.

be vacated on the statutory ground that the arbitrator exceeded his powers.

Section 12(a)(5) further provides:

[T]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Apparently this ground was added to negate the possibility that a court would not confirm an award which included new or additional substantive terms of an agreement to become effective upon issuance of the award.<sup>177</sup> This is not a problem in California. Awards involving substantive terms have been before the courts and have not been criticized on that basis.<sup>178</sup>

The present grounds for vacating an award should be left substantially unchanged. This is not to say that the present section is clear and easily intelligible. On the contrary, it is clumsily worded and raises difficult questions of interpretation. However, as the above discussion indicates, the section has been interpreted through the years by the courts of this State in a manner highly sympathetic to the theory of arbitration. Furthermore, Section 1288 is not a layman's section; it is used almost exclusively by courts and attorneys who can be expected to refer to applicable case law.

These factors compel the conclusion that it would be unwise to alter substantially the language of this section, and thereby open up new areas for judicial construction. Legislative intent is many times difficult to discover in California; and a court might conclude that the Legislature intended to impose stricter judicial control over the arbitration process were it to tamper with the already stated grounds. Therefore, it is recommended that no substantial change in the language of Section 1288 should be made.

### Procedural Aspects of Motions on the Award

Although California courts have ruled that the award becomes enforceable only if it is confirmed by the superior court,<sup>179</sup> they have also ruled that a motion for confirmation and an action for enforcement may be brought in the same action.<sup>180</sup> If a party brings a motion to confirm the award, the judge must confirm the award unless he vacates, modifies or corrects the award.<sup>181</sup> If an application for confirmation is dismissed "with prejudice" the order is in effect an order vacating the award.<sup>182</sup>

Section 11 of the Uniform Arbitration Act provides that if the award is not vacated, absent a motion to modify or correct, the court shall confirm the award. It seems desirable to dispose of post-award judicial proceedings at one time. To achieve this it is recommended that a sec-

<sup>177</sup> 1955 UNIFORM ARBITRATION ACT PROCEEDINGS at 59-60.

<sup>178</sup> *Stenzor v. Leon*, 130 Cal. App.2d 729, 279 P.2d 802 (1955) (substantive terms were involved in the award but the court vacated on another ground). Partnership awards often include substantive terms.

<sup>179</sup> *Consol. etc. Corp. v. United A. etc. Workers*, 27 Cal.2d 859, 167 P.2d 725 (1946); *Pneucrete Corp. v. U.S. Fid. & G. Co.*, 7 Cal. App.2d 733, 46 P.2d 1000 (1935).

<sup>180</sup> *Kerr v. Nelson*, 7 Cal.2d 85, 59 P.2d 821 (1936).

<sup>181</sup> *Ulene v. Murray Millman of California*, 175 Cal. App.2d 655, 346 P.2d 494 (1959); *Beckett v. Kaynar Mfg. Co., Inc.*, 49 Cal.2d 695, 321 P.2d 749 (1958).

<sup>182</sup> *Pleaters & Stitchers Assn. v. Davis*, 140 Cal. App. 403, 35 P.2d 401 (1934).

tion should be included in the arbitration statute to provide that where a motion to vacate, modify or correct is denied, the court shall *automatically* confirm the award; where a motion to modify or correct is granted, the award shall be confirmed as so modified or corrected. This is the normal result in practice—the usual procedure being that the respondent moves for confirmation in a cross-action. Conversely, it should be provided that a motion to confirm *must* be granted unless the award is vacated, modified or corrected on motion made within the applicable period.

### Time Limits

As previously noted, the common law is no longer applicable in California to written agreements to arbitrate. Thus if more than three months are permitted to elapse from the date the award is issued, the right to confirm the award is lost, unless the parties have waived the three month limitation.<sup>183</sup> Presumably other time limits, in the absence of waiver, would also be strictly enforced.

Time limits affecting motions on awards are summarized below. The table shows the time limits of the present California law and the Uniform Arbitration Act as well as recommended time limits.

|   | California   | Uniform Act | Recommended |
|---|--------------|-------------|-------------|
| Application to arbitrator to modify or correct award  | No provision | 20 days     | 10 days     |
| Answer to such application                            | No provision | 10 days     | 5 days      |
| Time within which arbitrator to issue corrected award | No provision | None        | 10 days     |
| Motion to confirm                                     | 3 months     | None        | 90 days     |
| Motion to vacate                                      | 3 months     | 90 days     | 30 days     |
| Motion to modify or correct                           | 3 months     | 90 days     | 30 days     |

It is to be noted that under the recommended time limits a motion to confirm may be made at any time within 90 days of the date of the award, whereas motions to modify or correct or vacate must be made within 30 days. It follows that a motion to confirm is to be automatically granted if made after 30 days have elapsed where no other motion has been made prior to the expiration of the 30-day period. This recommendation is founded on the theory that if grounds are available for vacation or modification, they should be urged promptly to insure finality. On the other hand, a motion to confirm is unnecessary unless the losing party becomes recalcitrant. The extended period serves to provide the parties time to ascertain whether the other parties are going to comply with the award, without the possible antagonism that recourse to the court might bring. It further serves to keep unnecessary litigation out of the courts.<sup>184</sup>

### Notice to Parties

Sections 1287 and 1290 of the Code of Civil Procedure require notice to be given to the other party whenever a motion is made on the

<sup>183</sup> CAL. CODE CIV. PROC. § 1287.

<sup>184</sup> For a discussion of the time limits relating to applications to the arbitrator to correct or modify, see discussion in text *supra* at G-51, G-52.

award. The period varies depending upon the motion involved. It is recommended that all notice provisions concerning motions be made uniform and be placed in one section of the statute.

#### Requirement for Attachment of Certain Papers

Section 1291 of the Code of Civil Procedure requires that the arbitration award and certain other papers be attached to any motion on the award. In construing Section 1291, the District Court of Appeal has ruled that the purpose of this requirement is to apprise the judge of the arbitration agreement, the names of arbitrators and the award. Hence, physical attachment of the papers is not required if the papers are accessible to the judge in the file of the action.<sup>185</sup>

#### Rehearing by Arbitrators

Without statutory authorization an award terminates the powers of the arbitrators and a court without consent of the parties would have no power to order a resubmission.<sup>186</sup> Both the Uniform Arbitration Act and the California statute, however, provide for rehearings at the discretion of the court if the award is vacated.<sup>187</sup> Under the California statute a rehearing by the arbitrators may not be ordered after the expiration of the time within which the agreement requires the award to be made. This requirement appears to be unduly restrictive. The Uniform Arbitration Act provides that, on rehearing, the time within which the award must be made under the terms of the agreement is to be computed from the date of the order granting the rehearing.

It is recommended that the California statute be revised so that it, too, will provide for the computation of the time specified in the agreement from the date of the rehearing order rather than from the date of the original submission.

#### Judgment

Sections 1291 and 1292 of the Code of Civil Procedure provide that upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith, and such judgment shall have the same force and effect as any judgment in an action. An order confirming an arbitration award is not subject to collateral attack.<sup>188</sup> No procedural or substantive changes are proposed in regard to this matter.

#### JUDICIAL REVIEW BY APPELLATE COURT

Section 1293 of the Code of Civil Procedure provides that a party may appeal from 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. It has been held that a dismissal of an action for the confirmation of an arbitration award is in effect an order vacating the award and, therefore, subject to appeal.<sup>189</sup>

<sup>185</sup> Puccinelli v. Nestor, 145 Cal. App.2d 48, 301 P.2d 921 (1956).

<sup>186</sup> Annot., *Arbitration—Reconsideration*, 104 A.L.R. 710, 718 (1936).

<sup>187</sup> CAL. CODE CIV. PROC. § 1288; UNIFORM ARBITRATION ACT § 12.

<sup>188</sup> Goldkette v. Daniel, 70 Cal. App.2d 96, 160 P.2d 145 (1945).

<sup>189</sup> Pleaters etc. Assn. v. Superior Court, 114 Cal. App. 35, 299 Pac. 555 (1931).

The arbitration statute has no provisions relating to appeals from orders made prior to the arbitration hearing.<sup>190</sup> Case law, however, has established that neither an order compelling arbitration<sup>191</sup> nor an order refusing to stay a civil action pending arbitration<sup>192</sup> is appealable. Thus, an appeal must be on the order made after the award or on the judgment entered thereon, or from the judgment resulting from the pending suit.<sup>193</sup>

Although a denial of a petition to compel arbitration and to stay the pending action is not appealable,<sup>194</sup> a denial of a petition to compel arbitration is appealable if no action is pending.<sup>195</sup> It is not clear, however, whether an appeal from an order denying a motion to compel arbitration is taken under Section 1293 of the Code of Civil Procedure or under Section 963 of the Code of Civil Procedure, which relates to appeals in civil proceedings generally.

It would seem advisable to make clear that an order denying a motion to compel arbitration is appealable, and to provide for such an appeal in the arbitration statute. This would be in conformity with the present spirit of the statute and with the similar provision in Section 19 of the Uniform Arbitration Act.

## JURISDICTION, VENUE AND COSTS

### Jurisdiction

The California Supreme Court in *Frey & Horgan Corp. v. Superior Court*<sup>196</sup> held that a notice may be properly designated as "process" when it is given by authority of law for the purpose of acquiring jurisdiction of a defendant. It follows, therefore, that upon valid service thereof, its effect necessarily must be to give the court personal jurisdiction over the defendant and to vest in the court authority to enter a personal judgment against the defendant upon such award as might be made in the proceeding. The court further stated in regard to jurisdiction over persons outside the State:

[U]nder the laws of this state, jurisdiction of the person can be acquired by a court, by service of process on the defendant extra-territorially, when the defendant by agreement with the plaintiff has consented to be amenable to process so served.<sup>197</sup>

It is recommended that this holding be codified and clarified by providing for jurisdiction of the parties by consent.

Before a party can obtain a valid court order (e.g., one directing arbitration or confirming an award), it is fundamental that the court must have personal jurisdiction of the "defendant." The present California statutes securing such jurisdiction over out-of-state parties,

<sup>190</sup> Section 1291 on appeals does not include orders granting or denying arbitration on a motion under Section 1282.

<sup>191</sup> *Wetsel v. Garibaldi*, 159 Cal. App.2d 4, 323 P.2d 524 (1958); *Jardine-Matheson Co., Ltd. v. Pacific O. Co.*, 100 Cal. App. 572, 280 Pac. 697 (1929).

<sup>192</sup> *Fischer v. Superior Court*, 105 Cal. App. 466, 287 Pac. 556 (1930).

<sup>193</sup> See notes 191, 192 *supra*.

<sup>194</sup> *Sjoberg v. Hastorf*, 33 Cal.2d 116, 199 P.2d 668 (1948).

<sup>195</sup> See *Trubowitch v. Riverbank Canning Co.*, 30 Cal.2d 335, 182 P.2d 182 (1947), in which the Supreme Court entertained an appeal from a judgment dismissing a petition for an order directing arbitration. See also *Sjoberg v. Hastorf*, 33 Cal.2d 116, 199 P.2d 668 (1948); *Squire's Dept. Store, Inc. v. Dudum*, 115 Cal. App.2d 320, 252 P.2d 418 (1953).

<sup>196</sup> 5 Cal.2d 401, 55 P.2d 203 (1936).

<sup>197</sup> *Id.* at 405, 55 P.2d at 204.

Sections 412 and 417 of the Code of Civil Procedure, are applicable only in those cases where the defendant was personally served with process and was a resident of this State at the time the cause of action arose, the action was commenced or the service was made. Therefore, a nonresident party to an arbitration agreement who refuses to arbitrate or to respond to the award may, by remaining outside California, prevent enforcement of the agreement or award and thereby render his agreement meaningless.

A nonresident party may, even in advance of any litigation, consent to a state's exercise of jurisdiction over him.<sup>198</sup> Apparently no problem would arise, therefore, if a provision were enacted that would make an agreement to arbitrate in California or any agreement to arbitrate entered into in California amount to a consent to the jurisdiction of the California courts to enforce the agreement and to enter judgment on the award.

The need for this type of provision is clearly demonstrated in a recent case in which the court could find no basis for its jurisdiction where the arbitration did not take place in the State even though the agreement was entered into in California.<sup>199</sup>

There seems to be no excuse for allowing the frustration of an otherwise valid agreement merely because of nonresidence if constitutional due process requirements are met. These requirements would be amply satisfied if the arbitration is to be held in California or if the agreement is executed in California, and service of process is made either by personal service outside the State or by registered letter. Service by publication should not be provided because such service may not give adequate notice; but in order to give the agreement primacy, the parties should be able to agree to other methods of service. The New York State act<sup>200</sup> and the Uniform Arbitration Act<sup>201</sup> contain provisions similar to those proposed herein.

### Venue

The venue of arbitration enforcement proceedings in California can be ascertained from the following summary:

|   |  |
|---|--|
| To obtain an order directing or compelling arbitration.       | Superior court of county or city and county where either party resides. (Section 1282)                                       |
| To obtain the appointment of an arbitrator.                   | Superior court of county or city and county where either party resides. (Section 1283 and reference therein to Section 1282) |
| To obtain a stay of a civil action.                           | The court in which the action is pending. (Section 1284)   |
| To enforce subpoenas and to direct the taking of depositions. | Superior court of the county or city and county in which arbitrators are sitting. (Section 1286)                             |
| To confirm, vacate, modify or correct an award.               | Superior court of the county or city and county in which arbitration was had. (Sections 1287, 1288, 1289)                    |

<sup>198</sup> *Wilson v. Seligman*, 144 U.S. 41 (1892); *Frey & Horgan Corp. v. Superior Court*, 5 Cal.2d 401, 55 P.2d 203 (1936).

<sup>199</sup> *Aurandt v. Hire*, 175 Cal. App.2d 758, 346 P.2d 800 (1959).

<sup>200</sup> N.Y. CIV. PRAC. ACT § 1450.

<sup>201</sup> UNIFORM ARBITRATION ACT § 17.

To enter judgment on the award.

Court specified by the parties in the submission agreement, or superior court of county or city and county in which arbitration was had. (Section 1281)

The California provisions concerning venue appear to be fair, but they suffer from a lack of clarity due to the organization of the statute. A recent case suggests that the lack of clarity also interferes with the court interpretation of the sections.<sup>202</sup>

These provisions are also incomplete in that they do not permit the courts to confirm an award if portions of the arbitration proceeding were conducted in several counties or outside the State.<sup>203</sup>

It would be desirable to clarify the provisions relating to venue and to place them in a single section. The section on venue should provide that the proper forum for proceedings to compel arbitration is the county where a party resides, does business, or where the agreement is to be performed. The section should also provide that the court of any county is proper where neither party resides or has a place of business in the State. It should also provide that the county where the arbitration is being (or was) held is the only place for initiation of court proceedings once the arbitration has commenced. This would be a practical arrangement tending to facilitate judicial supervision of arbitration.

### Costs

The California statute is silent concerning the problem of costs in proceedings to confirm, modify or correct an award. There have been some California decisions on this question. In *Squire's Dept. Store, Inc. v. Dudum*,<sup>204</sup> a party to an arbitration agreement made a motion to compel arbitration. The trial court found that the matter was not arbitrable within the terms of the agreement. An order awarding costs to the prevailing party, including his portion of the fees advanced to the neutral arbitrator, was affirmed. The District Court of Appeal held:

Upon final determination that arbitration was not in order, the losing party, . . . who prematurely brought the arbitration proceeding, should bear such costs necessarily incurred by the opposite party.<sup>205</sup>

In a later case, *Cecil v. Bank of America*,<sup>206</sup> costs were disallowed in a confirmation proceeding where the costs were not incurred in the court proceeding and neither the arbitration award nor the agreement made reference to costs. The court distinguished the *Squire's* case on the ground that costs may be allowed in a court proceeding under Section 1032 of the Code of Civil Procedure, but not when the disputed costs were incurred independently of the court action.

In a recent case<sup>207</sup> in which the court had specifically enforced an arbitration agreement, the trial court assessed costs in favor of the appellant on a motion to confirm the award. On appeal the full assessment of costs to the appellant was upheld. The appellate court argued that

<sup>202</sup> *Aurandt v. Hire*, 175 Cal. App.2d 758, 346 P.2d 800 (1959).

<sup>203</sup> *Cf. Aurandt v. Hire*, 175 Cal. App.2d 758, 346 P.2d 800 (1959).

<sup>204</sup> 115 Cal. App.2d 320, 252 P.2d 418 (1953).

<sup>205</sup> *Id.* at 332, 252 P.2d at 426.

<sup>206</sup> 142 Cal. App.2d 249, 298 P.2d 24 (1956).

<sup>207</sup> *San Diego Tavern etc. Assn. v. Local Joint Executive Board*, 174 Cal. App.2d 246, 344 P.2d 350 (1959).

arbitration is a special proceeding and, therefore, the awarding of costs is controlled by Section 1032 of the Code of Civil Procedure, which provides that costs are allowed as "of course" to the defendant upon a judgment in his favor in special proceedings. The court did say that the parties could have agreed for a division of costs, but the collective bargaining agreement which contained the agreement for the division of costs had expired by the time the action was brought.

The costs referred to in this case included costs of both the arbitration proceedings and the court proceedings. It is difficult to reconcile the case with the holding in the *Cecil* case. Although it was not referred to in the decision, the court was apparently influenced by appellant's argument that this was not a bona fide arbitration and that respondent had not entered into it in good faith but had used it for dilatory purposes. In any event it can be argued that this decision is limited to a situation in which an arbitration occurs after the agreement has expired.

### SUMMARY

As stated at the outset of this study, suggestions for revision of the California arbitration statute are primarily for the purpose of codifying the case law and clarifying and improving certain procedural aspects of the statute. These changes may be briefly summarized as follows:

A. New substantive provisions should include:

- (1) Extension of the coverage of arbitration statute to oral agreements to arbitrate.
- (2) Extension of the coverage of arbitration statute to appraisals and valuations.

B. Case law should be codified so as to provide expressly that:

- (1) Common law arbitration does not exist in California.
- (2) Agreements in collective bargaining contracts are within the arbitration statute.
- (3) Questions of both law and fact are within the arbitration statute.
- (4) Unless the parties otherwise agree the powers of the arbitrators may be exercised by a majority of them. (Uniform Act, Section 4)
- (5) The parties are entitled to be heard. (Uniform Act, Section 5(b))
- (6) Costs of arbitration proceedings are to be equally shared by the parties unless otherwise agreed, and costs of court actions are to be allocated according to Section 1032 of the Code of Civil Procedure.
- (7) The award shall be in writing and signed by the arbitrators, and it must include a determination of all issues and be delivered to the parties. (Uniform Act, Section 8)
- (8) The court must automatically confirm an award upon a motion by a party unless the court modifies, corrects or vacates the award. (Uniform Act, Section 11)



- C. Changes and additions to the procedural rules should be made so that the statute will :
- (1) Provide a procedure for the court to follow in its appointment of an arbitrator.
  - (2) Identify the arbitrators as neutral arbitrators or party arbitrators depending upon the source of their appointment.
  - (3) Expressly nullify the *Sapp v. Barenfeld* holding by providing that ex parte investigations by the arbitrator are permitted only with the knowledge and consent of the parties.
  - (4) Extend the powers of subpoena and the taking of depositions only to neutral arbitrators.
  - (5) Provide protection against inadvertent waiver of the right to counsel. (Uniform Act, Section 6)
  - (6) Give the court power to fix time limits for the making of an award if the parties have not done so. (Uniform Act, Section 8)
  - (7) Provide for default awards. (Uniform Act, Section 5(a))
  - (8) Give an arbitrator limited power to correct or modify his award. (Uniform Act, Section 9)
  - (9) Reduce from three months to 30 days the time limit on motions to vacate, correct or modify the award.
  - (10) Change the time limits within which a rehearing by the arbitrator may be held if the award is vacated.
  - (11) Provide that there may be an appeal from an order denying a motion to compel arbitration.
  - (12) Clarify and further define venue. (Uniform Act, Section 18)
  - (13) Provide that California courts can obtain jurisdiction over parties who make an arbitration agreement in this State. (Uniform Act, Section 17)
- D. To improve the organization and draftsmanship of the arbitration statute the following is suggested :
- (1) Place together in a single section all the provisions relating to venue, notice, procedures and requirements for court actions.
  - (2) Make uniform provision for all required notices to parties on court actions.
  - (3) Clarify the provisions in the statute on the arbitrator's power to take depositions.
  - (4) If other sections of the arbitration statute, or other Code of Civil Procedure sections, substantially affect any specific section of the arbitration statute, refer to them in the section affected.
  - (5) Consistently refer to all actions addressed to the arbitrator as applications and all actions addressed to the courts as motions.

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