Labor and Commercial Arbitration Under the California Arbitration Statute

*Sam Kagel**

THE increased use of arbitration to settle both labor and commercial disputes emphasizes the growing importance for an understanding of the California Arbitration Statute. In 1943 there were one hundred and twenty-four labor and commercial arbitration statutes in the United States.¹ Business agreements are increasingly providing for arbitration to settle disputes. In 1949, 83 percent of 1482 collective bargaining agreements in effect provided for some type of arbitration.²

This article first will outline the history of arbitration statutes in California, lawyer participation, its voluntary aspects, arbitration clauses and submission agreements, and remaining vestiges of common law. Then it will cover the practical problems an attorney meets in dealing with specific sections of the California Arbitration Statute.

California Arbitration Statutes

California's first arbitration statute was enacted in 1851.³ In 1927 the Judicial Council recommended that that statute be redrafted,⁴ and the present statute, enacted in that year, appears in Code of Civil Procedure, Sections 1280-1293. This statute is referred to as the California Arbitration Statute and, though originally thought to be applicable only to commercial arbitration, has been held to apply to labor arbitration as well.⁵

A statute designed to *promote* labor arbitration was enacted in 1937 and amended in 1947.⁶ Under this statute the State Department

* Member of the San Francisco Bar.

¹ U. S. DEPT. OF LABOR, LABOR ARBITRATION UNDER STATE STATUTES 25, 43 (1943).

² 70 MONTHLY LABOR REVIEW 160 (1950).

³ Sections 380-389 of the "Practices Act," Cal. Comp. Laws 1853, p. 588. In 1872 this statute was reenacted as CAL. CODE CIV. PROC. §§ 1281-1290.

⁴ FIRST REPORT OF JUDICIAL COUNCIL OF CALIFORNIA 20, 27 (1927).

⁵ Levy v. Superior Court, 15 Cal. 2d 692, 104 P.2d 770 (1940). (Arbitrations arising out of collective bargaining agreements come within the statute).

⁶ CAL. LABOR CODE § 65. In 1891 an arbitration statute dealing exclusively with labor disputes was enacted. Cal. Stats. 1891, c. 51. This statute was repealed in 1921. Cal. Stats. 1921, c. 614.

of Industrial Relations has authority to investigate and mediate labor disputes and arbitrate or arrange for the selection of boards of arbitration upon such terms as all the bona fide parties may agree. It would seem that arbitration arising out of the operation of this statute comes within the provisions of the California Arbitration Statute.⁷ Thus in California one statute promotes labor arbitration and another statute provides for the legal enforceability of both labor and commercial arbitration.

It is to be questioned whether labor and commercial disputes are so different that they require separate systems of arbitration. Conceding differences between commercial and labor disputes, one study concludes:⁸

Whenever employers and the leaders of labor are willing to be bound by their arbitration agreements as by ordinary contracts and are willing to reenforce their arbitration agreements with the enforcement powers of courts, the general arbitration statutes may best meet their needs. When they are less willing to place their trust in courts, they may find the special labor statute more suitable.

Lawyers and Arbitration

For several years prior to the enactment of the California Arbitration Statute, efforts were made to get the bar association to approve a proposed arbitration law. These efforts met with failure as a segment of the bar seemed to disapprove of arbitration on principle.⁹ Some argued that large corporations could force unfair arbitration upon individuals and smaller concerns. In part this prophecy was

⁷ *Levy v. Superior Court*, *supra* note 5, at 703-704, 104 P.2d at 776 (1940). The court held that it was not the legislative intent to exclude from CAL. CODE CIV. PROC. § 1280 arbitration arising out of collective bargaining agreements and quoted LABOR CODE § 923 and § 65 concluding that it would be difficult to uphold the legislative intent of these provisions "without recognizing the right of enforcement of collective contracts when voluntarily entered into by unions." Arbitrations arising out of such agreements are to enjoy this same enforceability under CAL. CODE CIV. PROC. §§ 1280-1293.

⁸ U. S. DEPT. OF LABOR, LABOR ARBITRATIONS UNDER STATE STATUTES 24 (1943).

⁹ FIFTEENTH ANNUAL MEETING OF CALIFORNIA BAR ASSOCIATION 70 (1924). At the 1924 convention of the State Bar, in discussing a proposed arbitration law, the then President of the State Bar, George F. McNoble, is reported as stating: "The Chairman does not believe in arbitration. He believes, like that great Mohammedan General, who, when they placed before him a great heap of Christian books, said: 'Do they support the Koran? It is unnecessary. Do they refute the Koran? They ought to be destroyed. In either instance they ought to be destroyed.' I am not in favor of arbitration because it takes ten times as long to get decisions from a court of arbitration as it does to go into court and throw your meat on the block and get your cut." The reporter of the convention then notes "(Laughter and applause)."

borne out by the experience in the motion picture industry as will be discussed.¹⁰

But the real opposition seemed to be due to fear of loss of work for lawyers should arbitration replace court litigation. This fear was apparently not well founded, since lawyers are well on their way toward performing almost all functions in the field. The New York Bar's investigation revealed the following facts:¹¹

1. For the year ended December 31, 1926, 36% of the parties in arbitration proceedings were represented by lawyers; by 1938 this figure increased to 70%.

2. In commercial arbitrations, lawyers participated in 80% of the cases in 1942 and 82% in 1946.

3. In labor arbitrations, lawyers participated in 84% of the cases in 1942 and 91.6% in 1947.

4. In commercial arbitrations, where specialists in particular trades or businesses are often chosen as two of the usual panel of three arbitrators, 21% of the arbitrators were lawyers. In labor cases 61% of the arbitrators were lawyers.

Voluntary Aspect of Arbitration

Less than sixty cases involving the California Arbitration Statute have been decided by our appellate courts. The number of cases decided by the superior courts where no appeal was taken, is, so far as can be ascertained, very small. Court litigation is slight in comparison with the activity in the field of arbitration during the past twenty-three years. But the increasing use of arbitration and the greater participation of lawyers in this field could result in more litigation. It should be noted, too, that labor arbitration has been included within the statute only since 1940. Inclusion of this important field of arbitration within the statute may bring increased litigation.

The nature of the process may account for the self-enforcement of arbitration agreements and awards. Perhaps the "high prevalence of good faith" between the parties results in the small amount of liti-

¹⁰ See Gang, *Commercial Arbitration in California*, 15 CALIF. L. REV. 289, 300 (1927). "The most commonly offered argument is that such a statute would be available as an instrument of oppression by powerful corporations which might dictate terms to smaller individuals and concerns and compel arbitration before biased boards of arbitrators." 16TH ANNUAL MEETING OF CALIFORNIA BAR ASSOCIATION 93 (1925). See Gotshal, *The Lawyers Place in Arbitration*, 2 ARB. J. 367 (1946).

¹¹ 34 A. B. A. J. 305 (1948).

gation under the statutes.¹² Basic to this display of good faith is the fact that arbitration, both labor and commercial, is grounded in voluntary agreement. Arbitration statutes recognize this principle. The United States Department of Labor in a study of state arbitration statutes points out that the "principle of voluntary action is implicit in all but a few state arbitration statutes." The study declares "although the term 'voluntary' is not used, the requirements of agreement and the absence of compulsory provisions make clear the intent to preserve complete freedom in the initiation of the arbitration proceedings."¹³ These observations are applicable to the California Arbitration Statute.

It is important that arbitration be founded upon voluntary acceptance of the process. Whether agreements to arbitrate are truly voluntary depends in most instances upon the relative bargaining power of the parties. In the industrial relations arena unequal bargaining power has often resulted in a lesser use of arbitration, the stronger party relying mainly on direct economic power to attain his demands. The growing use of arbitration in the labor field corresponds generally to the development of equalized bargaining strength of unions and employers. Arbitration has long been used in the newspaper publishing industry and garment trades where equality of power exists. Such equality, while not always excluding economic action, does lead to more frequent use of amicable methods of settling differences, including a greater use of arbitration.

Where a disparity of economic power is present, the voluntary acceptance of arbitration is absent to the degree that one party may force the other party to accept the arbitration process. Joint acceptance of arbitration occurs in balance of power situations, since both parties foresee stalemates resulting from complete reliance on economic power. This is true not only as to disputes arising during the life of the agreement, as already shown by the large number of agree-

¹² KELLOR, *ARBITRATION IN ACTION* 8 (1941). "It is a remarkable tribute to the high prevalence of good faith that less than 6 per cent of the agreements or awards, arbitrated under the Rules of Procedure of the American Arbitration Association, are referred to the courts for legal enforcement. It is an even higher tribute that, in more than one half of the instances, where arbitration is provided for, particularly in agreements for the settlement of future labor disputes, the mere presence of an arbitration agreement without resort to formal arbitration, is sufficient to effect a settlement It is but fair to state, however, that the foundation of arbitration law, which gives certainty and security to observance of arbitration, when good faith fails, is highly instrumental in inducing parties to make arbitration clauses or to submit existing disputes to arbitration."

¹³ See U. S. DEPT. OF LABOR, *LABOR ARBITRATION UNDER STATE STATUTES* 23 (1943).

ments that provide for arbitration as part of the grievance machinery, but also as to disputes arising after the termination of the agreement.

In the commercial field, there are numerous trade association arbitration agreements allowing sellers and buyers to incorporate a procedure approved by their respective associations.¹⁴ Here too the relative power of the parties may affect the voluntary basis of arbitration. The courts have outlawed agreements when the seller's economic strength has resulted in forcing buyers into compulsory arbitration. A contract between motion picture producers and exhibitors, which gave producers the option of cancelling the contract unless exhibitors agreed to arbitrate or furnish money security on each existing contract, was held tantamount to compulsory arbitration in violation of the Sherman Anti-Trust Act.¹⁵ Further litigation by the government against this industry resulted in a court approved arbitration arrangement. The producers as consenting defendants to the decree must accept arbitration when sought by the exhibitors or distributors. As to the latter the procedure is voluntary; they need not accept or become a party to an arbitration proceeding except as they choose.¹⁶

Arbitration Clauses and Submission Agreements

Parties to a commercial or collective bargaining agreement usually provide that *future* controversies shall be submitted to arbitration, by including a clause which defines areas of application and sets out the procedural rules.

In most commercial agreements, the clause merely provides that the parties agree to submit future controversies to arbitration. It then incorporates by reference the arbitration rules of a particular association.¹⁷ Though they vary, the rules generally cover such matters

¹⁴ E.g., see "Basic Sales Provisions" approved by the National Retail Dry Goods Association and the Apparel Industries Inter-Association Committee, which contains an arbitration clause.

¹⁵ *Paramount Famous Lasky Corp. et al. v. United States*, 282 U.S. 30 (1930); *United States v. Paramount Famous Lasky Corp.*, 34 F.2d 984 (1929).

¹⁶ *KELLOR, op. cit. supra* note 12, at 200, 384.

¹⁷ FOREIGN COMMERCE ASSOCIATION OF THE SAN FRANCISCO CHAMBER OF COMMERCE, UNIFORM CONTRACT AND RULES 3 (1943). "Clause Paramount, this contract is subject to published rules of the Foreign Commerce Association of the San Francisco Chamber of Commerce, adopted and now in force, which are hereby made a part hereof, except in so far as such rules may be specifically abrogated herein." *KELLOR, op. cit. supra* note 12, at 395. Standard Arbitration clause for Commercial Arbitration: "Any controversy or claim arising out of, or relating to, this contract or the breach thereof, shall be settled by arbitration, in accordance with the Rules then obtaining of the American Arbitration Association, and judgment upon the award may be entered in any court having jurisdiction thereof."

as how to initiate the arbitration, how the arbitrator is to be appointed, procedure for hearings, rules as to waiver, extension of time, form and scope of the award, fees and expenses,¹⁸ and in some cases application of special principles involving particular industries or goods.¹⁹ To initiate an arbitration under such a clause one makes a demand, setting forth his claims in accordance with the incorporated rules.

Clauses in collective bargaining agreements also provide for arbitration of future disputes. The practice of incorporating rules of a particular association is not as prevalent in labor agreements as in commercial agreements.²⁰ As a result, clauses in collective bargaining agreements usually embody some of the rules which, in commercial arbitration clauses, are incorporated only by reference to a particular set of rules promulgated by an association. A clause may specifically include the method of selecting an arbitrator, the scope of his authority, an agreement to be bound by the award, and details as to procedure and costs.²¹ Under such provisions, a demand to arbitrate, setting forth the particular claim, is usually sufficient to initiate proceedings.

When an actual dispute develops, the parties are bound to follow the agreement which, as already indicated, provides primarily for setting up and initiating the arbitration machinery. The specific issues to be submitted to arbitration should be set forth in a separate "submission agreement", which delimits the jurisdiction of the arbitration machinery.²²

Too often, particularly in labor arbitrations, the parties fail to provide a submission agreement. As a result, time must be spent in the formal hearing to ascertain the issues to be submitted to the arbi-

¹⁸ KELLOR, *op. cit. supra* note 12, at 359.

¹⁹ FOREIGN COMMERCE ASSOCIATION, *op. cit. supra* note 17, at 14, 16, 29, 34, 36, 37.

²⁰ The American Arbitration Association recommends a standard clause for labor agreements: "Any dispute, claim, question or difference arising out of or relating to this agreement, or its renewal or the negotiation of a new contract, shall be submitted to arbitration upon the initiative of either party to this agreement, upon notice to the other party, under the Industrial Arbitration Rules then obtaining, of the American Arbitration Association, and the parties agree to abide by and perform the award." KELLOR, *op. cit. supra* note 12, at 395. The use of this clause in labor contracts in California is not extensive.

²¹ For sample clauses see U.S. DEPT. OF LABOR, COLLECTIVE BARGAINING PROVISIONS, ARBITRATION PROVISIONS (1949).

²² KELLOR, *op. cit. supra* note 12, at 62 (1941). For sample submission agreements see 5 LABOR ARBITRATION INCLUDING MEDIATION AND CONCILIATION, LABOR EQUIPMENT 64, 611, 64, 612 (P-H 1946).

trator. To save time and clarify areas of arbitration, this jurisdiction of the arbitrator should be agreed upon beforehand.

Even where there is no primary agreement in force between the parties, but the parties desire to arbitrate all or some of the terms of such an agreement, a submission agreement is still essential. Such a submission agreement providing for arbitration of specific issues may incorporate by reference the procedural rules of some association. If such rules are not incorporated, the submission agreement should be more detailed. It at least should contain the names of the parties, name of arbitrator or method of selecting him, a clear statement of the issues, an agreement to accept the award as final, and the order of proof.

It is suggested that all arbitration clauses and submission agreements provide for application of Code of Civil Procedure Sections 1280-1293,²³ though it is very probable that such is the case even without a specific commitment. Where the parties voluntarily agree to arbitrate, they should have no objection to a clear cut statement agreeing to enforceability under the statute.²⁴

As already noted, arbitration clauses may incorporate by reference the rules of a particular association. It has been held that amendments made to such rules after the agreement is signed or during arbitration are binding if no substantial rights are affected.²⁵

Common Law and Statutory Arbitration

Whether common law and statutory arbitration both prevail today in California is of practical importance because the consequences are different. It seems certain that the common law is applicable to oral arbitration agreements since the California Arbitration Statute expressly is applicable only to written agreements.²⁶ However, the number of oral agreements to arbitrate is very small.

²³ This is provided in the present agreement between San Francisco Coat & Suit Association and International Ladies Garment Workers Union, Locals 8 and 213 of San Francisco, dated September 13, 1948.

²⁴ The submission agreements used by the Federal Mediation and Conciliation Service and the California Department of Industrial Relations, Conciliation Service, make no reference to the statute.

²⁵ *Pacific Vegetable Oil Corp. v. C. S. T. Ltd.*, 29 Cal. 2d 228, P. 2d 441 (1946).

²⁶ CAL. CODE CIV. PROC. § 1280. "Cal. Civ. Code Sec. 3390 (3) expressly provides that an agreement to submit a controversy to arbitration cannot be specifically enforced. Although this code section is not mentioned in the arbitration agreements [sic] of 1927, the presumption is that it is repealed in so far as it is applicable to agreements covered by the new law. Oral agreements to arbitrate are not enforceable under the new statute, so section 3390 still applies to them." Comment, 17 CALIF. L. REV. 643, n. 67 (1929).

While the 1851 and 1872 arbitration statutes were in force it was held that common law arbitration also prevailed.²⁷ Furthermore, in commenting on the 1927 statute it was said: "The new law contains no provision to the contrary, so evidently common law arbitrations are still valid."²⁸ No cases since the enactment of the 1927 statute have been found which discuss this point. However, in one district court of appeal case, the court talks as if common law arbitration still might be recognized.²⁹ Whether the common law should be applicable to written arbitration agreements in view of the 1927 Arbitration Statute is open to serious question.

That the difference between the common law and the statute may be very significant is shown by the following comparisons:

1. Under the common law an arbitration award is not a judgment. To enforce it, one must bring an action on the award.³⁰ Under the California statute an award when confirmed,³¹ modified or corrected,³² may be entered as a judgment³³ which will have the same force as a judgment in an action.³⁴

2. At common law an agreement to arbitrate is revocable until the award is actually rendered. Under the statute such an agreement is "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁵ Thus, under

²⁷ *Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817 (1912); *Meloy v. Imperial Land Co.*, 163 Cal. 99, 124 Pac. 712 (1912); *Kreiss v. Hotaling*, 96 Cal. 617, 31 Pac. 740 (1892); *Draghicevich v. Vulicevich*, 76 Cal. 378, 18 Pac. 406 (1888); *Mahoney v. Spring Val. W. W.*, 52 Cal. 159 (1877); *William v. Walton*, 9 Cal. 142 (1858); *Heslep v. San Francisco*, 4 Cal. 1 (1852); *Muldrow v. Norris*, 2 Cal. 74 (1852); 5 C. J. 19, 3 CAL. JURIS. 34.

²⁸ Comment, 17 CALIF. L. REV. 643, 646 (1929).

²⁹ *Rives-Strong Bldg. v. Bank of America*, 50 Cal. App. 2d, 810, 813, 123 P.2d 942, 944 (1942). The court said that "the determination of this appeal rests upon the question of whether or not the provisions of the lease constitute an arbitration agreement as contemplated by CAL. CODE CIV. PROC. 1280 *et seq.*, or possibly as recognized by common law." (Emphasis added). It is of some significance that the court posed the alternatives though not finally deciding the point at issue either on the basis of statutory or common law arbitration.

³⁰ For a discussion of the applicable common law see HOGG, *THE LAW OF ARBITRATION* 3 (1936); STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* 2, 5, 136, 159, 214, 333, 379, 422, 520, 672, 753, 880 (1930); U.S. DEPT. OF LABOR, *LABOR ARBITRATION UNDER STATE STATUTE* 3 (1943).

³¹ CAL. CODE CIV. PROC. § 1287.

³² *Id.* § 1289.

³³ *Id.* § 1291.

³⁴ *Id.* § 1292.

³⁵ *Id.* § 1280.

common law, one could refuse to arbitrate even though he agreed to do so in writing. Under the statute one can obtain an order directing the other party to proceed in accordance with the written agreement.³⁶

3. The common law permits an action to be brought notwithstanding an agreement to arbitrate, but under the statute the court may stay an action on an issue properly referable to arbitration by agreement.³⁷

4. At common law, if one of the parties refused to appoint an arbitrator, or the arbitrator refused to serve, the agreement became a nullity. The statute provides that the court may appoint an arbitrator in any of these cases.³⁸

5. Although the common law did not provide compulsory process to compel the attendance of witnesses or the production of documents or other evidence, under the code, the arbitrator may issue subpoenas for witnesses and documents, and approve the taking of depositions.³⁹

Without a specific incorporation of the statute, what assurances have parties to a written arbitration agreement that they are within the statute? Are all written arbitration agreements considered statutory, or may the parties find that it is the common law that controls their agreement? These questions remain to be answered by the courts.

Under the pre-1927 statutes there were available tests to determine whether an arbitration was statutory or governed by the common law. The pre-1927 statute applied to "any controversy which might be the subject of a civil action . . . except a question of title to real property in fee or for life."⁴⁰ The Supreme Court said in one case: "At common law it is competent for persons to submit any question or matter of difference to decisions of third persons, whether it could be the *object of an action* or not . . ." ⁴¹ (Emphasis added). The 1927 statute borrowed at least this much from the common law by providing that "any controversy" may be submitted to arbitration.⁴² Thus under the pre-1927 statutes an examination of the issues submitted to arbitration was one method of ascertaining whether the statutes or common law controlled. Since the 1927 statute permits all controversies to be arbitrated, this particular distinguishing mark

³⁶ *Id.* § 1282.

³⁷ *Id.* § 1284.

³⁸ *Id.* § 1283.

³⁹ *Id.* § 1286.

⁴⁰ Cal. Stat. 1851, p. 111, CAL. CODE CIV. PROC. § 1281 (Deering 1915).

⁴¹ *Dore v. Southern Pacific Co.*, 163 Cal. 182, 124 Pac. 817 (1912).

⁴² CAL. CODE CIV. PROC. § 1281.

between statutory and common law arbitration is no longer available.

Another test was available under the pre-1927 Section 1283. That section provided:

It may be stipulated in the submission that it be entered as an order of the superior court for which purpose it must be filed with the clerk of the county where the parties or one of them resides.

The clerk was to enter in his register of actions, the submission, the names of the parties, the names of the arbitrators and certain other information. If a submission was entered, it could be revoked only by both parties, the arbitrators could be compelled to make an award, and an award could be enforced in the same manner as a judgment. If the submission was not made an order of the court it might be revoked at any time before the award.

Thus, if the submission agreement was entered as an order of the court, statutory arbitration resulted, otherwise common law controlled. A stipulation to file the submission agreement with the clerk was indispensable to give the court jurisdiction to enforce the award under statutory procedure. A stipulation that the award alone should be entered as a judgment was insufficient to result in statutory arbitration.⁴³

The statute had to be strictly observed. If the parties filed a submission and the clerk failed to make the note in his register, the award was not within the statute.⁴⁴ And where the submission was filed but the parties stipulated away the material provisions of the statute, the award was not statutory, but was good under common law.

To determine under the pre-1927 statutes whether the statute or common law controlled the following tests were available:

1. Was the controversy subject to civil action?
2. Did the controversy involve title to real property?
3. Did the parties stipulate to file and actually file the submission agreement with the clerk of court?

The 1927 statute does not permit application of these tests. Any controversy including title to real property may be submitted to arbitration. There is no provision or requirement that the submission agreement be filed with the clerk or court. All arbitration agreements are irrevocable from the time made, if in writing. As a result, it would

⁴³ *Draghicevich v. Vulicevich*, 76 Cal. 378, 18 Pac. 406 (1888); *Fairchild v. Doten*, 42 Cal. 125 (1871); *Ryan v. Dougherty*, 30 Cal. 218 (1866); *Heslep v. San Francisco*, 4 Cal. 1 (1852). See *STURGES*, *op. cit. supra* note 30, at 275.

⁴⁴ *Kettleman v. Treadway*, 65 Cal. 505, 4 Pac. 506 (1884); *Pieratt v. Kennedy*, 43 Cal. 393 (1872).

seem that parties who agree in writing to arbitrate hazard whether they may be controlled by the statute or the common law with divergent consequences, unless they incorporate the statute by reference.

Without legislation to the contrary, it may be suggested that the common law should not be applicable to written arbitration agreements. The present statute, a detailed one, contravenes common law principles almost point by point. Legislative purpose to abolish applicable common law might be found from this fact alone. The statute obliterates all guideposts which under the previous statutes permitted notice whether one was contracting for statutory or common law arbitration. It is reasonable that parties who voluntarily agree in writing to arbitrate should be bound by the statute and should not as an afterthought be permitted to escape from their contract through the portals of the common law.⁴⁵

THE CALIFORNIA ARBITRATION STATUTE

The general arbitration statute, applicable to both commercial and labor arbitration, will now be examined in some detail.⁴⁶

Agreements to Arbitrate Existing and Future Disputes

Section 1280 of the Code of Civil Procedure declares that written agreements providing for the arbitration of either existing or future controversies are "enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." If the conditions of the statute are met, specific performance of such agreements may be obtained. Section 1280 also declares that "the provisions of this title shall not apply to contracts pertaining to labor." California courts have held, however, that this exclusion does not apply to arbitrations arising out of collective bargaining agreements,⁴⁷ or contracts applicable to professional persons.⁴⁸

⁴⁵ *Dickie Mfg. Co. v. Sound Const. & Eng. Co.*, 92 Wash. 316, 318, 159 Pac. 129 (1916). "In the face of so complete an act as ours we are clear, and find this proper occasion to say, that common law arbitration does not exist in this state and that the plain purpose of our legislation was to clear much unsettled practice by codifying arbitration."

⁴⁶ CAL. CODE CIV. PROC. §§ 1280-1293. As an annex to KELLOR, *op. cit. supra* note 12, at 217, Dean Sturges of the Yale Law School, examining various state statutes, follows an arrangement designed "to report in substantially chronological order of events in an arbitration the pertinent provisions of the arbitration statute." For the most part his arrangement has been followed here.

⁴⁷ *Levy v. Superior Court*, *supra* note 5; see Notes, 29 CALIF. L. REV. 411 (1941); 14 SO. CALIF. L. REV. 64 (1940); 54 HARV. L. REV. 500 (1941).

⁴⁸ *Universal Pictures Corp. v. Superior Ct.*, 9 Cal. App. 2d 490; 50 P. 2d 500 (1935), *hearing denied*.

In ruling that collective bargaining agreements are within the statute, the State Supreme Court declared:⁴⁹

[A] contract pertaining to labor means a promise to perform labor and a promise to pay therefore a stipulated price. The elements involved in that definition⁵⁰ are absent from a collective bargaining agreement which is distinct and separable from a contract of hiring. The function of the collective bargaining agreement is to be observed between the employer and the union, and itself contemplates that the contract of hiring shall be a distinct and separate transaction.

In distinguishing between a contract applicable to professional persons and a labor contract, a district court of appeal pointed out that "labor" as used in Section 1280 "applies to that kind of human energy wherein physical force, or brawn and muscle, however skillfully 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."⁵¹

*Who Can Agree to Arbitrate and What Controversies
Can be Submitted*

Section 1281 reads in part:

Two or more persons may submit in writing to arbitration any controversy existing between them at the time of the agreement to submit, which arises out of a contract or the refusal to perform the whole or any part thereof or the violation of any other obligation.

Thus individuals, partnerships, unions,⁵² corporations,⁵³ and municipal corporations⁵⁴ may arbitrate under the statute.

The meaning of the word "controversy" in the statute is important. In *Pacific Indemnity Co. v. Insurance Co. of North America*,⁵⁵ the court had before it an arbitration clause which read in part: "In the event of differences hereinafter arising between the contracting parties with reference to any transactions under this agreement, the same shall be referred to arbitrators." It was contended that the stat-

⁴⁹ Levy v. Superior Court, *supra* note 5, at 699, 104 P.2d at 774.

⁵⁰ LABOR CODE § 200. "Labor" includes labor, work, or service whether rendered or performed under contract, sub-contract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

⁵¹ Universal Picture Corp. v. Superior Court, *supra* note 48, at 494.

⁵² Levy v. Superior Court, *supra* note 5.

⁵³ CAL. CODE CIV. PROC. § 17.

⁵⁴ Cary v. Long, 181 Cal. 443, 184 Pac. 857 (1919).

⁵⁵ 25 F.2d 930 (9th Cir. 1928); Comment, 17 CALIF. L. REV. 643, 650 (1929).

ute only applied to disputes of fact arising under the agreement, and not to questions of construction or law. The court held that the statute was broad enough "to authorize the submission of any and all questions arising under a contract, whether such questions relate to the construction of the contract or to questions of law or fact arising thereunder."

The courts will, of course, look to the contract to ascertain what the parties agreed to submit to arbitration.⁵⁶ The statute also is used to determine what matters are arbitrable. Thus controversies arising out of partnership transactions,⁵⁷ or affecting real property⁵⁸ have been held arbitrable. There has been no holding under the 1927 statute as to whether the contest of a will is arbitrable.⁵⁹

The drafting of the arbitration clause or submission agreement is very important in so far as it sets forth the jurisdiction of the arbitration. The *Pacific Indemnity* case establishes that the statute permits the arbitration of "any and all questions arising under a contract." But even under the broad language of the submission agreement in that case, it is not clear whether in the absence of specific agreement, an arbitrator could determine damages for breach of contract.

Where the parties mean to permit the arbitrator to pass on a breach of contract and assess damages, it would seem prudent that they should so state in the arbitration clause or submission. It is interesting to note that the standard clause of the American Arbitration Association for commercial arbitrations specifically includes claims for breach of contract as an arbitrable matter.⁶⁰ But the suggested

⁵⁶ STURGES, *op. cit. supra* note 30, at 144. "It is reiterated by the courts as an elementary principle that the arbitration agreement of the parties is a charter of the authority of the arbitrators who are appointed to act thereunder. Each agreement must be consulted to ascertain what dispute or disputes the particular parties agreed to arbitrate."

⁵⁷ *Simons v. Mills*, 80 Cal. 118, 22 Pac. 25 (1889).

⁵⁸ *Snyder v. Superior Court*, 24 Cal. App. 2d 263, 74 P.2d 782 (1937).

⁵⁹ A pre-1927 case held that the contest of a will may not be submitted to arbitration. *Estate of Carpenter*, 127 Cal. 582, 585, 60 Pac. 162 (1900). The decision did not seem to rest upon the wording of the statute. The court said: "The matter of the probate of a will is a proceeding *in rem* binding on the whole world. A few individuals claiming to be the heirs cannot, by stipulation, determine such controversy. There are many other reasons why this submission cannot be sustained. The principal beneficiary under the will, being a minor, was not bound by it. The terms of the agreement itself are contradictory and absurd."

It would seem, however, that the broad language of the 1927 statute could permit arbitration in will cases; no serious policy questions seem to oppose such use of arbitration. See Note, 104 A. L. R. 348 (1936); *Arbitration of Johnson*, 87 Neb. 375, 127 N. W. 133 (1916).

⁶⁰ KELLOR, *op. cit. supra* note 12, at 395.

clause for labor arbitration makes no specific reference to claims for breach of contract.⁶¹ This distinction expresses the traditional reluctance of labor unions to place themselves in a position to be assessed damages for contract violation. Nevertheless a few collective bargaining agreements do make damages arbitrable.⁶² As a result of the Taft-Hartley Act some agreements provide for liquidated damages in case of contract violation and give the arbitrator authority to pass on the amount of damages.

In drafting arbitration clauses or submission agreements the jurisdiction of the arbitration proceeding should be carefully and specifically set forth. If the arbitration involves issues wherein each party is maintaining a specific position it is well to set forth these positions in parallel columns. If wages are an issue, the union's proposal should be listed in one column and immediately opposite should be stated the employer's proposal. The submission agreement should then provide that the arbitrator's authority is limited as to either the union or employer proposal or somewhere between. General language might be found either to grant or deny jurisdiction contrary to the intention of the parties.⁶³

⁶¹ KELLOR, *op. cit.* *supra* note 12, at 395.

⁶² U. S. DEPT. OF LABOR, UNION AGREEMENT PROVISIONS (Bull. No. 686) 163, 169 (1942).

⁶³ A case in the Superior Court of the City and County of San Francisco, *Murphy v. San Francisco Hospital Conference*, decided December 14, 1948, illustrates this point. Union and employers were parties to a two year agreement providing that at the end of the first year either party could open the agreement and seek a change in the monthly wage rates provided therein. The agreement also contained the following provision:

"In the event of any dispute arising over any of the terms or provisions of this agreement, the matter shall be referred to an Adjustment Board consisting of two (2) representatives of each party. No grievance shall be considered unless the aggrieved party has filed a complaint within thirty (30) days of the alleged occurrence thereof. A decision by a majority of the Adjustment Board shall be final and binding. In case of failure of a majority of the Adjustment Board to reach a decision, the parties shall agree upon a fifth representative, or umpire, who shall be a competent and disinterested person, who shall have the deciding vote on the matter at issue. The decision or award when made may, in the discretion of the Board, be made retroactive to the date when the complaint was first submitted for adjustment and shall be final and binding upon all concerned. Each party shall pay one-half of the cost of the impartial fifth representative or umpire. There shall be no interruption of work by Employer or Employees pending such final adjustment."

Negotiations having been inconclusive, the union sought arbitration. The employers argued that the grievance machinery including arbitration was applicable only to disputes arising out of the application of the agreement and that it was not applicable to an issue which in effect would change the terms of the agreement. The union, however, contended that "any dispute" included a dispute resulting from failure to agree on a

Many business agreements provide for arbitration to evaluate services or property where the parties fail to agree, for example, future rents in a lease or the price to be paid for property subject to an option to purchase. Are such differences "controversies" within the statute? Appraisals or evaluations, as distinguished by courts from arbitrations, are apparently not within the statute. The cases prior to 1927 held that there had to be a controversy to make the proceeding an arbitration. If the intent of the agreement was to provide a hearing and the taking of evidence, then arbitration was indicated; but if an independent examination of the subject matter was intended, an agreement for appraisal was present, and the statute did not apply.⁶⁴

In 1945 the Supreme Court in *Bewick v. Mechem*⁶⁵ reiterated this doctrine, without fully considering the possible effect of the 1927 statute on prior cases, or reexamining critically the basis of those decisions. The court declared that the sole task of the arbitrator in that case was "to determine the value of the land to fix the purchase price accordingly," and held that this did not constitute a controversy within the statute.

Use of a "controversy" test to distinguish appraisal from arbitration is, as Williston points out, "question-begging and unhelpful."⁶⁶ The fact remains that the parties find it necessary to resort to third parties to determine issues upon which they themselves cannot agree. Dean Sturges points out:⁶⁷

This basis of distinguishing the two classes of proceedings seems somewhat formal and relies upon an indirect definition of a "differ-

wage change. The court agreed with the union and issued an order directing the employers to arbitrate. There was no appeal taken.

In the drafting of grievance machinery the parties should provide specifically either that the grievance machinery is or is not to be applicable to interim openings on wages or other substantial features of the agreement. See also *Myers v. Richfield Oil Corp.*, 98 A. C. A. 879, 220 P. 2d 973 (1950).

⁶⁴ *Dore v. Southern Pac. Co.*, 163 Cal. 182, 124 Pac. 817 (1912); *M. E. Church v. Seitz*, 74 Cal. 287, 15 Pac. 839 (1887); *Thompson v. Newman*, 36 Cal. App. 248, 171 Pac. 982 (1918); Comment, 17 CALIF. L. REV. 643, n. 26 (1929).

⁶⁵ 26 Cal. 2d 92, 156 P. 2d 757 (1945).

⁶⁶ 6 WILLISTON ON CONTRACTS 5376 (1936). "Other tests are often laid down by courts, but these seem question begging and unhelpful." *Id.* at 5376, n. 9, "For example, the differentiation is made often in such tests as that arbitration presumes a dispute or controversy . . . the functions of appraisers are 'ministerial'; those of arbitrators 'judicial,' the award of appraisers is intended only for the establishment of facts, that of arbitration for judgment."

⁶⁷ STURGES, *op. cit.* *supra* note 30, at 19.

ence," "a dispute," "a controversy," It seems doubtful if parties to such agreements will indulge in negotiations for, or submit to, the aid and interference of the third person or persons in their affairs before they have appreciated a necessity to do so because of their own failure to adjust the matter. To declare that there is no "difference," "dispute" or "controversy" between the parties in such cases seems to amount to a declaration that there is no such "difference," "dispute" or "controversy" as the Courts will include within their broad conceptions of those terms.

The *Bewick* case reaffirmed the distinction between appraisal and arbitration based on the test of whether the parties intended a formal hearing and the taking of evidence. This "test" is hardly such an immutable characteristic of arbitration that the presence or absence of a hearing can always be used to distinguish appraisals from arbitrations.⁶⁸ The rule is not uniform in all jurisdictions.⁶⁹ Even in California, if the parties stipulate for notice and an opportunity to be heard, the difference disappears; the courts have noted that even in "true" arbitrations the right to a hearing may be waived.⁷⁰

Historically there may have been a basis for distinguishing between appraisal and arbitration. The fact that under the common law and the pre-1927 statutes, agreements to arbitrate were not specifically enforceable is a valid reason for having made a distinction. "The original purpose of the distinction was to permit the courts to save a limited class of agreements from the disapproval which precedent bound them to apply generally to arbitrations."⁷¹ The courts wanted to save this "limited class of agreements" because the agreement to arbitrate was one of the usual "stipulations of a contract founded on other and good consideration."⁷²

⁶⁸ STURGES, *op. cit. supra* note 30, at 25.

⁶⁹ *Ibid.*

⁷⁰ *Stockwell v. Equitable F. & M. Ins. Co.*, 134 Cal. App. 534, 25 P. 2d 873 (1933), *hearing denied*. The court stated that Cal. Code Civ. Proc. § 1288 clearly contemplated giving of notice of hearing of an arbitration board and "affording interested parties opportunity to furnish proof of their claims." But that "There are cases which hold that this service of notice may be waived by the interested parties." See *Sapp v. Barenfeld*, 34 Cal. 2d 515, 212 P. 2d 233 (1949).

⁷¹ Dayton, *Book Review*, 45 HARV. L. REV. 771, 773 (1932).

⁷² *Palmer v. Clark*, 106 Mass. 373, 389 (1871) cited with approval in the *Bewick* case. The court in the *Bewick* case relies mainly on *Church v. Seitz* to continue the doctrine of "appraisals in California," and in the *Church* case (295-296) the court said that "in a case like the present, where the reference to a third person is provided for in a contract made long before any controversy arises, *which contract is made upon valuable consideration other than the mutual promise to submit to the decision of the third party*, the decision being merely one link in the chain of the claim, we think that the proceeding

Obviously, the courts felt that justice required such agreements to be specifically enforced. To grant this if other requirements of the law were met, they had to avoid the rule against enforcing arbitration agreements. The courts held that if no "controversy" existed, or if no formal hearing and evidence taking was intended, the arrangement was appraisal, not arbitration. Being appraisal the courts were willing to enforce the arrangement. The wavering, unnatural distinctions between arbitration and appraisals resulted.

The courts developed another device to enforce arbitration agreements in the face of precedent against enforcing specific performance of such agreements. A long line of cases held in effect that "if the matter to be submitted to the arbitrator was the mere finding of a fact or facts the determination of which is essential to the accrual of the cause of action itself, such arbitration or finding becomes a condition precedent to the right to sue."⁷³

In wrestling with the common law and the old statutes applicable to arbitration, the courts often avoided their consequences. In some cases they declared arbitration to be appraisal and therefore not affected by arbitration law, while in other cases they held that arbitration was a condition precedent to the right to sue. In either case the courts in effect granted specific performance and avoided the rule of revocability.

As long as the common law and the old statutes gave the courts no alternative but to develop artificial distinctions to avoid them, there could be some justification for the situation,⁷⁴ but under the present statute, there is no reasonable basis upon which to continue this distinction.⁷⁵ Agreements to arbitrate are not revocable under the statute, therefore the motive to provide specific enforcement where the agreement to arbitrate or appraise was part of the consideration for the entire contract, may now be gratified by resort to the statute.⁷⁶

is not an arbitration, and in the language of the Supreme Court of Massachusetts . . . the decision may be made without notice of hearing, 'unless such notice and hearing be required by express provision or reasonable application.' " (Emphasis added).

⁷³ *E.g.*, *Blodgett Co. v. Bebe Co.*, 190 Cal. 665, 667, 214 Pac. 38, 39 (1923); *cf.* CAL. CODE CIV. PROC. § 1284.

⁷⁴ *STURGES*, *op. cit.* *supra* note 30, at 18-42.

⁷⁵ 6 WILLISTON ON CONTRACTS 5379 (1936). "The technical distinction between appraisal and arbitration . . . though once . . . having a purpose in affording some relief against the rigor of the old rule, have outlived their usefulness and should be eliminated from the law, as tending to confusion and being without logical applicability."

⁷⁶ In the *Bewick* case for example the plaintiff prevailed. The same result could better be reached by following the California Arbitration Statute eliminating outmoded

In the 1945 *Bewick* case the Court quoted with approval from the New York case of *Brink v. N. A. Fire Ins. Co.*, decided in 1867:⁷⁷ "There is scarcely a day in which in commercial transactions the valuation of property, or estimate of damages is not entrusted to third parties, and no one has yet dreamed of looking upon them as arbitrations." It should be noted that while the New York courts in 1867 had not "dreamed" of looking upon evaluations as arbitrations, a view shared by the 1945 California court, in 1940 the New York legislature was aware of the fact that the reason for the old rule no longer existed, and found no difficulty in bringing appraisals within the arbitration statute.⁷⁸

Common sense dictates that an appraisal involves a controversy. Otherwise, the parties would not need to submit the appraisal to a third person. Though under the statute time for hearing and evidence taking is implied, the parties may specifically or impliedly waive this requirement. The bringing of "appraisals" within the statute would eliminate confusion in the law and would more probably coincide with intent of the parties.

However, under the present state of the law, provisions dealing with valuations should be drafted with care. The advantages of having such agreements come within the arbitration statute are many. It is suggested that such clauses include at least the following: that Code of Civil Procedure Sections 1280 to 1289 are to apply to arbi-

law which no longer has validity and only continues uncertainty and confusion. In the *Bewick* case, plaintiff-lessee sought to enforce an option to purchase land. The agreement provided for arbitration if necessary to fix the purchase price and terms. Defendant refused to appoint his arbitrator. Plaintiff brought an action and the trial court set the price and ordered defendant to perform his contract. Defendant appealed, claiming that plaintiff had failed to proceed under CAL. CODE CIV. PROC. § 1283, which provides that the court could appoint an arbitrator. The Supreme Court affirmed the judgment for the plaintiff, but held that the California Arbitration Statute did not apply. By failing to fulfill a condition, that is, by refusing to appoint his arbitrator, defendant could not defeat his liability. The court, holding the statute applicable, could have prevented the defendant from successfully establishing a bar to the suit on the ground that the defendant was in default of the arbitration agreement under CAL. CODE CIV. PROC. § 1284. Under that section, the court need not stay an action until an arbitration has been had in accordance with the terms of the agreement, when the applicant for the stay is in default in proceeding with the arbitration. This was precisely where the defendant stood in the case.

⁷⁷ 5 Robt. 123, 28 N. Y. Super. Ct. Rep. 104 (1867).

⁷⁸ CIVIL PRACTICE ACT, NEW YORK, art. 84, § 1448 as amended (1940). "Such submission or controversy may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties."

trations arising thereunder; that the matters to be submitted are "controversies" arising out of the contract and are to be settled by arbitration;^{78a} that the parties either expressly provide for hearings, taking of evidence, and notice of hearings, or expressly waive these matters. It is likely that a court confronted with such a contract will be willing to recognize the true intent of the parties and hold the statute applicable.

Provisions Concerning Form

To come within the statute, an agreement to arbitrate must be in writing.⁷⁹ No special language is required but the arbitration clause or submission agreement should provide that the parties agree to accept the award as final and binding. A district court of appeal decision held that where the differences were to be submitted to the arbitrator for determination, "the law implies an agreement to abide by the determination." Where an agreement states that differences are to be submitted to an arbitrator "*for determination*," there is a tacit agreement to abide by that determination. "There appears to be no other reason for submitting the differences to an arbitrator."⁸⁰

Section 1281 provides in part that the parties may "agree that a judgment of a court of record, specified in writing, shall be rendered upon the award, made pursuant to the submission." The inclusion of such a provision in the submission agreement does not seem mandatory. As one authority points out, "the operation of the statute is complete without recourse to this stipulation; its remedies do not appear to be dependent upon it."⁸¹

Remedy in Case of Default Under Agreement to Arbitrate

If a party refuses to proceed to arbitrate in accordance with a written agreement, the other party under Section 1282 may obtain an

^{78a} It is apparently important to use the specific words "to settle by arbitration." *Case v. Kadota Fig Assn.*, 35 A. C. 643, 651, 220 P.2d 912 (1950), held that an agreement to select an accountant, where the parties disagreed on any matter involving computation or allocation of costs, "to make such determination" was not an agreement to arbitrate. The court said: "An essential element of a provision for arbitration is agreement of the parties 'to settle by arbitration' a controversy which may arise between them. Here there was no agreement to abide by the 'determination' of an accountant selected by them." See also *Snyder v. Superior Court*, 24 Cal. App. 2d 263, 74 P.2d 782 (1937), *hearing denied*, where the appellate court said that where the differences were to be submitted to an arbitrator for determination, the law "implies an agreement to abide by the determination."

⁷⁹ CAL. CODE CIV. PROC. § 1281.

⁸⁰ *Snyder v. Superior Court*, *supra* note 78, at 270, 74 P.2d at 786.

⁸¹ STURGES, *op. cit. supra* note 30, at 312.

order directing that the arbitration proceed. As an arbitration clause or submission is not self-executing, if a party does not act to enforce the arbitration he waives his rights.⁸² If arbitration is to be effective at a certain time, permitting an unreasonable time to elapse constitutes a waiver of the right to enforce arbitration. Thus, in one case where arbitration was provided for at the time of "final payment," permitting three months to elapse from that date was a waiver.⁸³

The statute requires, when petitioning a court for an order directing arbitration, that five days notice in writing of the hearing must be served personally on the party in default.⁸⁴ It has been held that the service on the defendant, extra-territorially only, of such notice is valid process. This gives the court authority to enter a personal judgment upon such award as may be made if the defendant by agreement has consented to be amenable to process so served.⁸⁵ The party in default may obtain a jury trial of the issue of the making of or the default of the agreement.

Section 1284 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 under the agreement to arbitrate. This raises the question as to when a party is in default under an agreement to arbitrate. The Supreme Court in 1935 held in *Clogston v. Schiff-Lang Co.*, that in a contract providing for arbitration of "any differences," a party may not sue unless arbitration has taken place, or an effort has been made to get the other party to arbitrate.⁸⁶ The court cited a case under the old statute, which held that "arbitration or *an unsuccessful attempt to secure the same* is a condition precedent to the right to maintain an action for breach of contract."⁸⁷ (Emphasis added).

Thus the plaintiff must not only be willing to arbitrate, but apparently also has the burden of making at least an "unsuccessful at-

⁸² *Pneucrete Corp. v. U.S. Fidelity & Guaranty Co.*, 7 Cal. App. 2d 733, 46 P. 2d 1000 (1935); *Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 182 P. 2d 182 (1947); *Landreth v. South Coast Rock Co.*, 136 Cal. App. 457, 29 P. 2d 225 (1934); 3 CAL. JURIS. 54; Notes, 117 A. L. R. 301 (1938); 161 A. L. R. 1426 (1946); *Clogston v. Schiff-Lang Co., Inc.*, 2 Cal. 2d 414, 41 P. 2d 555 (1935).

⁸³ *Jordan v. Friedman*, 72 Cal. App. 2d 726, 165 P. 2d 728 (1946).

⁸⁴ CAL. CODE CIV. PROC. § 1282.

⁸⁵ *Frey and Horgan Corp. v. Superior Court*, 5 Cal. 2d 401, 55 P. 2d 203 (1936).

⁸⁶ 2 Cal. 2d 414, 41 P. 2d 555 (1935); *Collier and Wallis, Ltd. v. Astor*, 9 Cal. 2d 202, 70 P. 2d 171 (1937); *Gonsalves v. Hodgson*, 98 A. C. A. 589, 220 P. 2d 560 (1950).

⁸⁷ The court quoted the syllabus from *Davisson v. East Whittier Land Co.*, 153 Cal. 81, 83, 96 Pac. 88 (1908).

tempt" to get the defendant to arbitrate. It is difficult to see how under the present statute there can ever be an "unsuccessful" effort to make the other party arbitrate. The plaintiff under Section 1282 can obtain an order directing the other party to arbitrate. If the other party still refuses, then as in a default proceeding the arbitrator on the basis of an *ex parte* hearing should be permitted to make an award which can be confirmed as a judgment. If the defendant refuses to join in the appointment of an arbitrator, the court may make the appointment. Thus, it would seem that a stay is automatically forthcoming in every instance until the arbitration has been concluded. The court should require the plaintiff to make an effort, by resort to the statute, to get the other party into arbitration or obtain an award *ex parte*.

If the burden placed upon the plaintiff to obtain arbitration, however, is not extended to require him to proceed through the statute but simply to make an oral or written request to arbitrate, and the other party refuses to arbitrate, the court should refuse to stay the action, holding that the defendant has waived arbitration. If, when requested to arbitrate, the "defaulting" party agrees to arbitrate, the action should be stayed. Otherwise the court would be determining the issue of default, perhaps the precise issue that the arbitration is to determine. Again, if the defaulting party unreasonably delays arbitration, the court could find a waiver and refuse a stay.

Many collective bargaining agreements, as already noted, provide for arbitration as the terminal point of the grievance procedure. If either union or employer takes action affecting the rights of the other without arbitration of a proper issue, the court might find a waiver and refuse to stay the action of a party seeking damages. Where a party has agreed to arbitrate he should not be permitted to take strike or lockout action in violation of the agreement, and then seek to stay action for damages by resort to arbitration. The statute necessarily assumes the good faith of the party seeking its protection.

The courts have yet to decide such points as:

1. How far must the plaintiff go in making an attempt to get the other party to arbitrate?
2. Must the plaintiff resort to the statute seeking an order directing arbitration, or is an oral or written request sufficient?
3. At what point must the issue of default be referred to arbitration and the action stayed?
4. In what cases will the court hold that the defaulting party has waived arbitration and refuse to stay the action?

In view of the uncertainties on these questions, some provision as to defaults should be written into arbitration clauses and submission agreements. It might well be provided that after proper written notice the failure of one party to appear would not prevent proceeding with the arbitration. The arbitrator could be empowered to make a decision after an *ex parte* hearing. Since such an award would be within the terms of the agreement, it could under the statute be affirmed as a judgment and specifically enforced.

In some jurisdictions, if a party to the arbitration is given reasonable notice of the time and place of hearing but still absents himself, the arbitrator can hear the party present and render an award.⁸⁸ The California statute makes no provision for this situation nor have any cases been reported on this issue. Logically, however, this situation is analogous to that of a default judgment and should be treated accordingly.

Who May Act as Arbitrators

There is no specific provision in the statute as to who may act as arbitrator. Therefore the parties may select the arbitrator by the method provided in the agreement. Even an award of the State Labor Commission is in the nature of an arbitration award which may be enforced under the arbitration statute.^{88a} Where no method of selecting an arbitrator is provided, where a party refuses to follow the agreed method, or where there is a lapse in naming the arbitrator or in filling a vacancy, the superior court upon application of either party will appoint the arbitrator.⁸⁹

In a case where for three months one arbitrator failed to meet with the arbitrator selected by the other party to select a third arbitrator, an order removing the delinquent arbitrator was upheld on appeal. He had been repeatedly requested to meet, and had made no reasonable explanation of his refusal to act.⁹⁰

Arrangements for the Hearing

The arbitrator designates the time and place of hearing, but there is no requirement that he give notice of it. Under the 1872 statute, the Supreme Court held that such a requirement was implied and must be

⁸⁸ STURGES, *op. cit. supra* note 30, at 442.

^{88a} Robinson v. Superior Court, 35 A. C. 407, 414, 218 P.2d 10, 16 (1950).

⁸⁹ CAL. CODE CIV. PROC. § 1283.

⁹⁰ Cathcart v. Security Title Ins. Co., 66 Cal. App. 2d 469, 152 P.2d 336 (1944).

given to all interested parties.⁹¹ No formal notice of a hearing is required where all the parties are present and participate in the hearing. This is so, even though the submission agreement provided expressly for formal notices of all hearings.⁹²

The term "interested parties" has not been defined by statute or the courts. Is notice served upon the union sufficient where a particular member is involved? If a claim of a union may affect a rival minority union must the minority union be served? These questions remain unanswered.

The arbitrator has the power to adjourn the hearing from time to time.⁹³ He may require any person to appear before him as a witness. Subpoenas issue in the arbitrator's name and the court may compel attendance or punish for refusal or neglect to obey. He may petition a court to direct the taking of evidence depositions. The statute provides that the arbitrator may require a person "in a proper case to bring with him any book or written instrument." This provision obviously refers to the subpoena duces tecum. Particularly in labor arbitration such a power might permit "fishing expeditions." For example, an attempt might be made to force an employer to produce financial records even in a case where he was not arguing financial inability to meet the demands of the union.

Though the statute is not clear, nor are there any cases in point, it is reasonable to assume that the issuance of subpoena must be in accordance with Section 1985 of the Code of Civil Procedure. Under that section and the decided cases, known and identified papers must be produced, but must be material and relevant to the issue.⁹⁴

The statute requires that all arbitrators sit at the hearing unless the parties otherwise consent in writing. If the parties proceed in the absence of an arbitrator, consent will be presumed.⁹⁵

Generally parties to an arbitration agreement make provision as to costs. There is no statutory authority on this subject. In the absence

⁹¹ *Curtis v. Sacramento*, 64 Cal. 102, 28 Pac. 108 (1884).

⁹² *Sapp v. Barenfeld*, *supra* note 70.

⁹³ CAL. CODE CIV. PROC. § 1286.

⁹⁴ *McClatchy Newspapers v. Superior Court*, 26 Cal. 2d 386, 396, 159 P.2d 944 (1945); *Union Trust Co. v. Superior Court*, 11 Cal. 2d 449, 458, 81 P.2d 150 (1938); *Paladini v. Superior Court*, 178 Cal. 369, 173 Pac. 588 (1918); *Ex parte Clarke*, 126 Cal. 235, 58 Pac. 546 (1899); *Shell Oil Co. v. Superior Court*, 109 Cal. App. 75, 292 Pac. 531 (1930); *Gubin v. Superior Court*, 104 Cal. App. 469, 286 Pac. 471 (1930); *Funkenstein v. Superior Court*, 23 Cal. App. 663, 139 Pac. 101 (1914); *Kullman Salz & Co. v. Superior Court*, 15 Cal. App. 276, 114 Pac. 589 (1911).

⁹⁵ *United Farmers Assn. v. Klein*, 41 Cal. App. 2d 766, 107 P.2d 631 (1940).

of agreement, the arbitrator evidently has the authority to award costs, even though this may not have been submitted to him for decision.⁹⁶

The Conduct of the Hearing

Contrary to the 1872 statute the present law does not require that the arbitrator be sworn. The arbitrator has authority to administer oaths to witnesses, which, however, are not mandatory in the absence of express agreement.⁹⁷ However, if the arbitrator is requested to administer oaths he should accede. Absent such request, the right is considered to be waived.⁹⁸

There are no provisions governing evidence, and the arbitrator has discretion both as to admissibility and weight.⁹⁹ The Supreme Court has said "all relevant evidence may be freely admitted and rules of judicial procedure need not be observed so long as the hearing is fairly conducted. The hearing may be in the nature of an informal conference rather than a judicial trial."¹⁰⁰ The sufficiency of the evidence to sustain the award will not be reviewed, unless otherwise provided by the terms of the arbitration agreement.¹⁰¹

Generally arbitrators may take judicial notice of relevant facts. There are no code sections in this field, but relevancy and availability to both parties of the information are good guideposts for the arbitrator. The Supreme Court has held 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 remarked that this procedure could be *ex parte* without notice of hearing to the parties; that arbitrators are empowered to obtain from disinterested persons of acknowledged skill information with reference to technical questions, provided that "the award is the result of their own judgment after obtaining such information."¹⁰²

Even though an arbitrator can go beyond the record as to technical questions, it is questionable whether arbitrators should take ad-

⁹⁶ *Dudley v. Thomas*, 23 Cal. 365 (1863). This was a holding under the 1851 statute, which like the 1927 statute contained no specific provision on costs.

⁹⁷ *Sapp v. Barenfeld*, *supra* note 70.

⁹⁸ *Rives-Strong Bldg. v. Bank of America*, 50 Cal. App. 2d 810, 123 P.2d 942 (1942); *Matter of Silliman*, 159 Cal. 155, 113 Pac. 135 (1911).

⁹⁹ *Sage v. Alexander & Oviatt Corp.*, 138 Cal. App. 476, 32 P.2d 655 (1934).

¹⁰⁰ *Sapp v. Barenfeld*, *supra* note 70, at 520, 212 P.2d at 237.

¹⁰¹ *Utah Const. Co. v. Western Pac. Ry.*, 174 Cal. 156, 162 Pac. 631 (1916).

¹⁰² *Sapp v. Barenfeld*, *supra* note 70, at 521, 212 P.2d at 238.

vantage of this possibility. Basically, the decision should be determined on the record made by the parties appearing before him. If the arbitrator relies extensively on his own knowledge or even on the opinions of disinterested persons which are not known to the 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.

The better practice, where the record is lacking in some important matters, might be to address questions to the parties. The arbitrator may even suggest that certain experts be made available in a hearing. In such a case the expert would in effect become a witness of the arbitrator but at least would be available for cross-examination.

Occasionally the parties agree that the arbitrator may call upon an outside expert to make an investigation. For example, he may be authorized to use a certified public accountant to check into financial conditions. In such cases, both parties should be free to submit to the arbitrator suggestions as to the form and extent of the investigation, but the final direction to the outside expert should be made by the arbitrator. The results of the investigation should be presented to the parties for analysis, rebuttal and argument. In this manner, the parties will be aware of all the evidence that the arbitrator will use as a basis for his judgment, and will have an opportunity to examine and rebut it.

Arbitrators seldom delegate the taking of testimony. This might be done where the parties agree and the evidence may be available only at some distant point. In important cases, however, the arbitrator and parties should travel to the site of the evidence. In the 1934 Coastwise Longshore Arbitration, hearings were held by the board in most ports on the Pacific Coast.

Making the Award

The statute specifies no time limit within which an award must be rendered. The parties may set a time limit in the arbitration clause or submission agreement.

Customarily the award is in writing, delivered to the parties or their attorneys. There is no requirement that the arbitrator set forth his findings of fact or state his reasons.¹⁰³ In commercial arbitration, the award is usually a decision on the submitted issue, without a state-

¹⁰³ *Id.* at 522, 212 P.2d at 239; *Pacific Vegetable Oil Corp. v. C. S. T. Ltd.*, 29 Cal. 2d 228, 174 P.2d 441 (1946).

ment of findings or reasons, while in labor arbitration it is almost universal to include findings and reasons.

Absent a special agreement, a majority of the arbitrators can make an award. In labor arbitration it is not unusual for minority arbitrators to write a dissenting opinion.

Enforcement of the Award

If a party wants judicial confirmation of an award, the "award must be in writing and acknowledged or proved in a like manner as a deed for the conveyance of real estate, and delivered to one of the parties or his attorney."¹⁰⁴ If confirmation is not sought there seems to be no such requirement.

An award may be confirmed at any time within three months.¹⁰⁵ Either party may ask for an order to confirm from the superior court in the locality where the award was made. Five days written notice must be served on the other party or his attorney before the hearing. To the application for the order must be attached copies of the arbitration agreement, a statement setting forth the appointment of the arbitrator, each written extension of the time, if any, within which the arbitrator had to make the award, and the award.¹⁰⁶

Must an award be confirmed prior to the bringing of an action to recover on it? It has been held that both confirmation and enforcement may be brought in the same action.¹⁰⁷ When a motion to confirm is made the judge must confirm, unless he vacates, modifies or corrects the award.¹⁰⁸

Absent an extension of the time in writing, if parties permit more than three months to elapse from the time of the award, the right to confirm apparently is lost. There is some uncertainty, since it is not clear whether common law arbitration is recognized in this state. In other jurisdictions recognizing both statutory and common law arbitration, common law enforcement may be used where the statutory time limit has lapsed.¹⁰⁹ Such holdings nullify the statute and, so far

¹⁰⁴ CAL. CODE CIV. PROC. § 1287.

¹⁰⁵ The parties may extend this time in writing. *Ibid.*

¹⁰⁶ *Id.* § 1291.

¹⁰⁷ *Kerr v. Nelson*, 7 Cal. 2d 85, 59 P. 2d 821 (1936).

¹⁰⁸ *Pleaters and Stitches Assn. v. Davis*, 140 Cal. App. 403, 35 P. 2d 401 (1934).

¹⁰⁹ See *STURGES, op. cit. supra* note 30, at 11. "The fact . . . that the statutory time limit for enforcing a statutory award by the statutory method has expired has been held by the Supreme Court of North Dakota to be no bar to the enforcement of the award by common law remedy. A Court of Appeals of Missouri has advanced the same view under the Missouri statute," citing *Hockney v. Adam*, 20 N.D. 130, 127 N.W. 519

as California is concerned, would seem to be another reason to determine without qualification that only statutory arbitration is recognized.

Annulment or Correction of the Award

An award may be vacated if procured by corruption, fraud or undue means, or if there was corruption "in the arbitrators" or fraud was used to obtain the arbitration agreement.¹¹⁰ Furthermore, an award may be vacated where the arbitrator is guilty of refusing to postpone the hearing upon sufficient cause shown, refusing to hear pertinent and material evidence, or any other prejudicial misbehavior.¹¹¹ The guilt must be more than mere error of judgment.¹¹²

An additional ground for vacating an award occurs if the arbitrator exceeds his power.¹¹³ The range within which an award may be made is evidenced by the submission agreement.¹¹⁴ If the submission agreement does not authorize a cash award but one is made, the arbitrator has exceeded his jurisdiction.¹¹⁵ Where an agreement provided that awards "shall not be in conflict with the express provisions" of the collective bargaining agreement, the arbitrator exceeded his authority when he ruled that Saturdays, for purposes of holiday pay, fell within the regularly scheduled work week where the primary agreement defined the work week as being five days, Monday through Fri-

(1910); *Caldwell v. Brooks Elevator Co.*, 10 N.D. 575, 88 N.W. 700 (1901); *Beall v. Board of Trade of Kansas City*, 164 Mo. App. 186, 148 S.W. 386 (1912).

¹¹⁰ CAL. CODE CIV. PROC. §§ 1288a, 1288b. CAL. PEN. CODE §§ 93, 95, 96, providing penalties in cases of attempted corruption of arbitrators, and where arbitrators make themselves parties to corruption. See *Stockton Works v. Ins. Co.*, 98 Cal. 557, 33 Pac. 633 (1893).

¹¹¹ CAL. CODE CIV. PROC. § 1288(c). *Matter of Silliman*, 159 Cal. 155, 113 Pac. 135 (1911) (no error where the arbitrator refused to reopen a case for further evidence, when to do so would have made it impossible to return the award within the time contemplated by the submission agreement); *Moore v. Griffith*, 51 Cal. App. 2d 386, 124 P.2d 900 (1942) (vacation of award sought where arbitrator refused to hear a witness; *held*: Must be shown that competent and material evidence was excluded by action of arbitrator).

¹¹² *Manson v. Wilcox*, 140 Cal. 206, 73 Pac. 1004 (1903); *Peachy v. Ritchie*, 4 Cal. 205 (1854).

¹¹³ CAL. CODE CIV. PROC. § 1288.

¹¹⁴ *Bierlein v. Johnson*, 73 Cal. App. 2d 728, 166 P.2d 644 (1946); Comment, 17 CALIF. L. REV. 643, 659 (1929).

¹¹⁵ *Ibid.*

day inclusive.¹¹⁶ If the agreement provides a time within which the award must be rendered, an award made thereafter is a nullity.¹¹⁷

Even if an arbitrator exceeds his authority, the award will not be vacated when the issues submitted are not affected. However, if the matter acted upon cannot be separated from the rest of the award without violating the plain intention of the parties, the entire award is void.¹¹⁸

Ordinarily "the merits of the controversy between the parties are not subject to judicial review."¹¹⁹ An award must be predicated on a legal contract. The powers of an arbitrator derive from a valid contract. Therefore when the contract is itself illegal, the courts will not enforce an arbitration award arising out of such an agreement. The Supreme Court has held:¹²⁰

But . . . the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award. When so raised the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held binding upon the trial court.

The authority of the arbitrator ceases when the award is made. He cannot later amend it, nor can he initiate rehearings and make a substitute award unless the parties resubmit the case to him.¹²¹ If the arbitrator fails to make a mutual, final and definite award, grounds for vacation exist.¹²² The award is valid if it "serves to settle the entire controversy."¹²³

An early California case held that an award cannot be impeached because it is contrary to law or evidence either at common law or under

¹¹⁶ *Screen Cartoonists Guild v. Walt Disney Prod.*, 74 Cal. App. 2d 414, 168 P.2d 983 (1946), *hearing denied*.

¹¹⁷ *Willis F. & C. Co. v. Porter*, 88 Cal. App. 523, 263 Pac. 842 (1928).

¹¹⁸ *White v. Arthur*, 59 Cal. 33 (1881).

¹¹⁹ *Pacific Vegetable Oil Corp. v. C. S. T. Ltd.*, 29 Cal. 2d 228, 174 P.2d 441 (1946).

¹²⁰ *Loving and Evans v. Blick*, 33 Cal. 2d 603, 609, 204 P.2d 23, 26 (1949); see *Franklin v. Nat. C. Goldstone Agency*, 33 Cal. 2d 628, 204 P.2d 37 (1949).

¹²¹ *Sturges, op. cit. supra* note 30, at 510; *Dudley v. Thomas*, 23 Cal. 365 (1863); *Porter v. Scott*, 7 Cal. 312 (1857).

¹²² CAL. CODE CIV. PROC. § 1288(d).

¹²³ *Sapp v. Barenfeld, supra* note 701, at 523, 212 P.2d at 239.

the statute.¹²⁴ Whether an arbitrator's decision on questions of law and facts is final and not subject to judicial review seems to depend on the submission agreement. If the submission agreement is unqualified the "award cannot be set aside by the superior court, or by the court on appeal, on the ground that it is contrary to the law or the evidence, unless the error appears on the face of the award."¹²⁵ If the submission agreement is qualified and provides, for example, that an arbitrator should "make his judgment and award according to the legal rights of the parties," a different rule seems to apply.¹²⁶ In such a case apparently the award is subject to judicial review. The Supreme Court has said: "Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action."¹²⁷ The wording of the arbitration clause or submission agreement is important then, affecting the limits of review.

May an arbitrator impeach his award? It has been held that if the award is within the submission agreement, it may not be impeached by an arbitrator. That is, an arbitrator "cannot impeach the award by testifying to his fraud or misconduct," but his "testimony is admissible to show what matters were submitted for decision and were considered by the arbitrators."¹²⁸

Procedurally one may not introduce evidence to have an award vacated, modified or corrected, in an action to confirm.¹²⁹ Nor will a motion affecting an award be heard if the decision would not affect present relations of the parties. So when an arbitrator made an award under a collective bargaining agreement, the court held an appeal moot, since the parties meanwhile had arrived at a new agreement covering the point at issue.¹³⁰

Where an award is vacated, the court may in its discretion direct a rehearing if the time within which an award can be made has not expired.¹³¹

¹²⁴ *Carsley v. Lindsay*, 14 Cal. 390 (1859).

¹²⁵ *Utah Const. Co. v. Western Pac. Ry.*, 174 Cal. 156, 159-160, 162 Pac. 631, 633 (1916).

¹²⁶ *Ibid.*

¹²⁷ *Sapp v. Barenfeld*, *supra* note 70, at 523, 212 P. 2d at 239.

¹²⁸ *Ibid.*

¹²⁹ *Kerr v. Nelson*, 7 Cal. 2d 85, 59 P. 2d 821 (1936).

¹³⁰ *Consolidated Vultee Aircraft Corp. v. United Auto. Workers*, 27 Cal. 2d 859, 167 P. 2d 725 (1946).

¹³¹ CAL. CODE CIV. PROC. § 1288.

An award may be modified or corrected if there is a mistake in calculation or description, if the award is imperfect in form not affecting the merits of the controversy, or, if the arbitrator has ruled on a matter not submitted. Such awards can be corrected or modified only if the merits of the controversy are not affected.¹³²

Appeals from a Judgment Confirming, Vacating or Modifying an Award

"An appeal may be taken 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."¹³³ If a motion for such orders is granted, an appeal may be taken. If the motion is denied, and the award is thereafter entered as a judgment, the appeal should be taken on the denial of the motion.¹³⁴ The provision on appeals is considered to be restrictive and there may not be an appeal either from an order directing arbitration, or refusing to stay an action pending arbitration.¹³⁵ Any application under the statute must be heard in a "summary way in the matter provided by law for making and hearing of actions."¹³⁶

Section 1291 provides that if an order is granted confirming, modifying or correcting an award, judgment may be entered on the award. Such judgment shall be docketed as if it were rendered in an action. Section 1292 provides that a judgment so entered has the same force and effect as a judgment in an action, and may be so enforced.

CONCLUSIONS AND SUGGESTIONS

From this study of the California Arbitration Statute it may be pertinent to point out a few conclusions and suggestions:

1. The increased use of arbitration in labor and commercial disputes points up the importance of the California Arbitration Statute.
2. Lawyers, acting both as advocates and arbitrators, are becoming increasingly active in the field of arbitration.

¹³² CAL. CODE CIV. PROC. § 1289, (a), (b) and (c).

¹³³ *Id.* § 1293.

¹³⁴ *Robinson v. Superior Court*, 35 A.C. 407, 218 P.2d 10 (1950); *Utah Const. Co. v. Western Pac. Ry.*, 174 Cal. 156, 162 Pac. 631 (1916); *In re Connor*, 128 Cal. 279, 60 Pac. 862 (1900); *Jardine-Matheson Co. Ltd. v. Pacific Orient Co.*, 100 Cal. App. 572, 280 Pac. 697 (1929).

¹³⁵ *Sjoberg v. Hastorf*, 33 Cal. 2d 116, 199 P.2d 668 (1948); *Fischer v. Superior Court*, 105 Cal. App. 466, 287 Pac. 556 (1930); *Jardine-Matheson Co. Ltd. v. Pacific Orient Co.*, 100 Cal. App. 572, 280 Pac. 697 (1929).

¹³⁶ CAL. CODE CIV. PROC. § 1285.

3. Either the courts or the legislature should make a clear cut determination that the common law does not apply to written contracts to arbitrate. The statute alone should be applicable to written agreements to arbitrate. Due, however, to existing uncertainty, it is advisable that all arbitration clauses and submission agreements specifically provide that proceedings arising out of such clauses or agreements are covered by the Code of Civil Procedure, Sections 1280 to 1293.

4. While the California Arbitration Statute is workable, certain clarifications and additions should be considered. Some of these are:

a. The distinction between appraisals or valuations and arbitrations should be abolished and appraisals or valuations be brought specifically within the terms of the statute as arbitrations.

b. Code of Civil Procedure, Section 1284, which provides that an action may be stayed pending arbitration, providing that the party who applies for the stay is not in default, should be clarified to answer these questions: When is the party in default? How far must the plaintiff go in making an attempt to get the defendant to arbitrate? Must the plaintiff proceed through the statute to obtain an order directing arbitration, or is an oral or written notice demanding arbitration sufficient? When has a party waived arbitration so that the court will not under any circumstances stay an action against that party?

c. Provisions should be made for default decision by an arbitrator after sufficient notice of place and time of hearing.

d. The statute should provide that the authority of an arbitrator to issue subpoena duces tecum shall be in accord with Code of Civil Procedure, Section 1985.

e. The limits of legal review of an arbitration award should be clarified and specified as far as possible.