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Arbitration, A Third Alternative

This comment examines the recent California statutes passed during the 1970 session to provide a method for determining just compensation by arbitration between the condemner and the landowner. The thrust of the legislation is to attempt to secure the bargaining position of the landowner when he feels that he is not receiving just compensation. Presumably he could now turn to arbitration without fear of depreciating his award by incurring exorbitant costs. However, upon critical examination, the method provided by this legislation may not be of substantial benefit to the landowner. An examination of other, more practical solutions is also included.

Under present California eminent domain law the property owner and the condemning agency are faced with limited alternative methods for the determination of just compensation. Article I, section 14 of the California State Constitution provides that compensation be determined by a jury unless waived. Various condemnation statutes provide for the acquisition of property through negotiations with the property owner.¹ A small number of little used special statutes have set up other methods which might be used to determine the amount of compensation.² Generally, however, the two ways of obtaining property under eminent domain law are private negotiation and court trial. At present, around 90% of eminent domain acquisitions are settled out of court by direct negotiations between the condemner and the condemnee.³ The relatively few procedures available for determination of compensation have caused a number of problems and inequities.⁴

¹ See, e.g., CAL. CIV. CODE § 1001. The typical provision states that property may be acquired "either by consent of the owner or by proceedings had under the provisions of Title 7, Part 3, of the Code of Civil Procedure . . ."

² See CAL. CONST. art. XII, § 23a; and CAL. PUB. UTIL. CODE §§ 1401-21. These statutes provide for determination of compensation by the Public Utilities Commission. See also CAL. STREETS & H'WAYS CODE §§ 4000-4443, CAL. GOV'T CODE §§ 38000-38213 and CAL. CODE CIV. PROC. § 1248. These statutes provide for referring the question of compensation to referees if there is a waiver of trial.

³ Hearing on A.B. 125, before the California Assembly Ways and Means Committee, March 31, 1970 [hereinafter cited as Ways and Means Committee Hearings]. The figure given for the General Services Department was 93% of all disputes. The 90% figure seemed to be accepted as indicative of all condemnation by the state.

⁴ See Ayer, *Allocating the Costs of Determining "Just Compensation"*, 21 STAN. L. REV. 693 (1969) [hereinafter cited as *Ayer*]; Latin, *The Arbitration of Eminent Domain Cases*, 14 RIGHT OF WAY 57 (Oct. 1967) [hereinafter cited as *Latin*]; Hanford,

Cost of Litigation

The major issue to be determined in most condemnation actions is the amount of compensation to be paid the condemnee for his property.⁵ By case law in California this amount must be the fair market value; that is, the "highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it was capable."⁶ It is this amount that is sought in a court proceeding and theoretically, it is this sum that would be offered the condemnee by the condemner in private negotiations.

All too often, however, for a variety of reasons the offer made by the condemner is lower than fair market value. This may be the result of a legitimate variance in opinions of appraisers.⁷ If there is, in fact, room for variation in such appraisals, one might expect the condemner's appraisal to be on the low side. The possibility also exists that the condemner's appraisal was made some time prior to his offer. Due to inflation, an eleven-month old appraisal may not reflect current values.⁸ A low estimated market value might also result from an appraiser who, given a large tract of land to appraise, strives for an overall consistent appraisal rather than an evaluation of each portion of the land in light of its special characteristics.⁹

It has been shown in other jurisdictions that original offers to the property owner are purposely lower than the fair market value.¹⁰ In some cases, this may be an attempt to establish a better bargaining position so that the condemner may then raise his offer and thereby convince the condemnee to settle. Although this form of haggling may at first seem justifiable, the law requires just compensation. Evidence shows that many condemnees actually settle for the first amount

Problems Beyond Our Control? 16 RIGHT OF WAY 42 (June 1969) [hereinafter cited as *Hanford*]; 1969 CAL. L. REVISION COMM'N REPORTS 123 [hereinafter cited as C.L.R.C. REPORT].

⁵ *Ayer* 693.

⁶ *Sacramento S.R.R. Co. v. Heilbron*, 156 Cal. 408, 409 (1909). See also CAL. EVID. CODE § 814.

⁷ *Ayer* 715. Professor Ayer uses 10% as a reasonable margin by which "competent and unbiased appraisers can be expected to differ."

⁸ *Hanford* 44.

⁹ *Id.* at 43.

¹⁰ *Ayer* 711-13; Schulz, *The Great Land Grab Scandal*, READER'S DIGEST, Dec. 1968, at 100; U.S. NEWS & WORLD REPORT, March 25, 1968, at 99. In this report it is stated that one:

can expect local housing agencies, when buying real estate for projects that the Department of Housing and Urban Development helps to finance, to "offer each owner the full fair price for his property immediately without negotiation." Saying that *this is not always being done*, HUD directs the local agencies to follow such a policy. (emphasis added).

offered,¹¹ even though they may not in fact be receiving just compensation.

Perhaps the most reprehensible practice which results in a below fair market value offer is that in which the amount that it would cost the condemnee to pursue his remedy in court is subtracted from the fair market value.¹² Professor Ayer in his article *Allocating the Costs of Determining "Just Compensation"* calls this a "litigation avoidance payment."¹³ While there is little hard evidence that such a practice exists in California, the fact that it is a possibility is enough to warrant providing a suitable remedy.

Whatever the cause of the low offer by the condemner, the property owner who did not want to sell his property in the first place is faced with the dilemma of either accepting the low offer or going to court and paying attorney and appraiser fees and possible court costs¹⁴ to get that to which he has always been entitled. Therefore, in most cases, if the difference between the offer by condemner and fair market value is less than his costs to go to court, the property owner will end up bearing the litigation avoidance payment.¹⁵

There have been numerous ways suggested for alleviating this problem. The most obvious way would be to make the condemner liable for all litigation expenses for both sides if a court trial were made necessary.¹⁶ This would seem fair since the condemnee in all likelihood had no desire to sell his property in the first place. The condemner probably would wish to avoid such proceedings and, therefore, would offer an amount to the property owner which could be as high as the sum of the fair market value plus contemplated trial costs.¹⁷ In this way the condemner would be paying the litigation

¹¹ Ayer 712.

¹² Ways and Means Committee Hearings. Assemblyman Warren indicated that such a practice was common in California.

¹³ Ayer 701.

¹⁴ CAL. CODE CIV. PROC. § 1255, gives the court discretion to allocate costs as it sees fit between the adverse parties. Such costs do not include attorney's or appraiser's fees.

¹⁵ C.L.R.C. REPORT 128, n. 10.

Attorneys who specialize in condemnation cases have advised the Commission that normally they must decline to accept a case where the difference between the condemner's offer and the probable award if the case is tried is less than \$3,000-\$5,000. The reason is that the unrecoverable costs of defending such a case will equal or exceed the potential increment between the offer and the award.

¹⁶ See Ayer 698. S.B. 299, 1970 Regular Session, introduced by Senator Cologne in the California legislature, was a step toward making the condemner liable for more of the litigation expense of the condemnee. It would make reasonable appraiser's fees a cost which could be recovered by the condemnee. S.B. 299 was amended to make such fees recoverable only by a condemnee when his place of residence is the subject of the condemnation. S.B. 299 was approved by the legislature as amended but was vetoed by the Governor on September 20, 1970.

¹⁷ Ayer 699-701.

avoidance payment to the condemnee in the form of a bonus. While this would seem to be more equitable, it also would result in paying more than the law mandates and would result in a windfall to the property owner. There is also evidence that such a policy would lead to a great increase in litigation, thereby burdening our already overburdened courts.¹⁸

Professor Ayer has proposed a method of allocating the costs of litigation which would charge each party proportionate to his responsibility for forcing the matter into the courts.¹⁹ This plan would compare the last offers for settlement of each party to the court award. If the court award were closer to the offer of the condemnee than to that of the condemner, the condemner would be liable for a portion of the condemnee's litigation costs. In all cases the condemner would be liable for his own court costs.²⁰

While this method of cost apportionment would be more adequate than the existing system, it still would have the drawback of uncertainty as to the cost of litigation. The small property owner who might not be able to afford any litigation costs would still be at a great bargaining disadvantage with respect to the government agency or public utility with unlimited resources for such fights. Therefore, as long as a court battle would be required for an unbiased determination of just compensation, the problem of litigation expense would remain.

Time Required for Litigation

A great deal of time passes in all court proceedings before an ultimate decision is reached. While it is true that condemnation cases have a statutory priority over other civil matters,²¹ the general backlog of cases makes for damaging delays.²² In situations where the condemning agency does not have a right to immediate possession an extended court battle with possible appeals could severely hamper government projects and planning.²³ On the other hand, the property owner is frequently in financial jeopardy due to the necessity of hold-

¹⁸ In Florida, where the condemner is required to pay all litigation costs of the condemnee, settlements by negotiation have dropped from 90% to 20% in Dade County. See Britton, *Effect in Florida of Requiring Condemnor to Pay Condemnee's Entire Litigation Expense*, 10 *RIGHT OF WAY* 15 (Oct. 1963).

¹⁹ *Ayer* 702-3.

²⁰ *Id.*

²¹ CAL. CODE CIV. PROC. § 1264.

²² McCoy, *Pretrial in Eminent Domain Actions*, 38 *LOS ANGELES BAR BULL.* 439 (1963).

²³ *Latin* 58; 8 CAL. L. REVISION COMM'N REPORTS 1101 (1967); C.L.R.C. REPORT 130.

ing property under threat of condemnation.²⁴ If rental property is the subject of the action, experience has shown that lease renewals disappear under threat of condemnation.²⁵ In addition, the resale value of the threatened property is lowered.²⁶ These losses of rent and ability to resell are not compensable under California law.²⁷ Therefore with each lingering day of litigation the property owner is further damaged—another factor which may force the property owner to sell at a lower than fair market value. Essential to just compensation is the elimination of delays inherent in litigation. Remedies involving allocation of costs would not solve this problem.

Other Problems With Present Eminent Domain Procedure

Both condemnee and condemner are faced with the unpredictability of jury awards.²⁸ In the case of *State v. Wherity*,²⁹ the dissenting opinion of Justice Friedman delineates this problem.

In this era of the law explosion no phase of judicial administration is more ripe for reform than eminent domain valuation. Trial judges, lawyers and appraisers are willy-nilly players in a supercharged psychodrama designed to lure twelve mystified citizens into a technical decision transcending their common denominator of capacity and experience. The victor's profit is often less than the public's cost of maintaining the court during the days and weeks of trial.³⁰

Ill will seems to be especially rampant in condemnation suits,³¹ and frequently the condemner is faced with the prospect of dragging his own customers into court.³² Any alternative which would mitigate this atmosphere of emotional discontent should be welcomed by both parties.

Arbitration: A Third Alternative

Many authors have suggested that arbitration of just compensation in an eminent-domain situation would be a workable alternative to the two present methods.³³ The American Arbitration Association has recently published a set of eminent domain arbitration rules in an at-

²⁴ *Hanford* 43-4.

²⁵ *Id.* at 44.

²⁶ *Id.* at 43.

²⁷ *Id.* at 44-5.

²⁸ C.L.R.C. REPORT 129.

²⁹ 275 A.C.A. 279, 79 Cal. Rptr. 591 (1969).

³⁰ *Id.* at 290, 79 Cal. Rptr. at 598.

³¹ *Latin* 59.

³² *Id.*

³³ See note 4, *supra*.

tempt to make arbitration adaptable to condemnation cases.³⁴ In California, there is no specific statutory basis for the use of arbitration in condemnation actions; however, the power to negotiate may imply the power to arbitrate.³⁵ There has been no use of such an inferred power and it might be argued that the legislature did not contemplate arbitration when it passed the eminent domain statutes. However, there are indications that if arbitration were authorized by statute, some public agencies particularly on the local level, would use arbitration at least on an experimental basis.³⁶

Assembly Bill 1290

Assembly Bill 1290 was a strange combination of remedies which would have done little to resolve the inequities of the present system.

The measure provided that the condemner would first make an offer to the condemnee equal to the fair market value of his property, after which the property owner "may either accept the offer made by the public agency or request that determination of the fair market value of the property be submitted to arbitration, which may be either tentative or formal."³⁷

Formal arbitration, as defined by this bill, would have been the decision of a committee of three appraisers: one selected by the condemner, one by the condemnee, and one agreed on by both. A vote of two appraisers would have been required to agree upon an award, and the cost of arbitration would have been shared equally by the condemner and condemnee.³⁸

Tentative arbitration merely meant that the arbitrators would be chosen, and then, before arbitration, there would be an estimation of the cost of arbitration. At this point if the cost of arbitration was too high for the condemnee, he could accept the previous offer of the condemner and the arbitration would never take place.³⁹

The most surprising part of this unusual piece of legislation is the statement: "If the award is not accepted by both the public agency and the property owner, either party may institute judicial proceedings

³⁴ Eminent Domain Rules of the American Arbitration Association (effective June 1, 1968).

³⁵ See note 1, *supra*.

³⁶ C.L.R.C. REPORT 129, n.13; Hearings on A.B. 125, before the California Assembly Judiciary Committee, March 2, 1970. At this hearing it was announced that the board of supervisors of San Bernadino County had sent a letter supporting A.B. 125, because it would provide for arbitration of "just compensation."

³⁷ A.B. 1290, 1970 Regular Session, proposed CAL. CODE CIV. PROC. § 1241(a).

³⁸ A.B. 1290, 1970 Regular Session.

³⁹ *Id.*

to determine the award as if no arbitration had taken place.”⁴⁰ In other words, the arbitration would cost much but mean little.

The conclusion of the bill provided for a cost allocation of the litigation if the dispute were to go to trial after arbitration. In such instances, if the court award were more or equal to the arbitration award, costs, including attorney and appraiser fees would have been awarded to the property owner. If the award of the court were less than the arbitration figure, the property owner would have been required to pay his and the condemner's costs.

It is evident that the arbitration allowed by A.B. 1290 would not have helped to solve the litigation cost problem, which is the primary reason for having another alternative for determining compensation. Professor Ayer, speaking of a formal three member arbitration board, stated:

Unless the parties limit their presentation, an arbitration proceeding can be as costly as a trial. Indeed, it can be more expensive for the parties since in the case of arbitration, they must bear the costs of providing for the tribunal—costs that are borne by the public in the case of courts.⁴¹

Therefore, in a case in which the amount in dispute is small, the lot of the property owner would not be aided and in fact might be made worse if this method of arbitration were used.

The arbitration allowed by A.B. 1290 might work to solve the time problem involved with court litigation to benefit both the condemner and the condemnee. But since either party could ignore the arbitration award and proceed to court anyway, in many cases the delay would merely be increased.

A.B. 1290 also had the potential of becoming a powerful club that could be used by the government to extort a settlement at less than fair market value. The so called tentative arbitration seems to be the leverage needed to force agreement by showing the high cost of arbitration. It would have almost threatened the property owner; “If you don't settle for our inadequate offer, you will be required to pay more in arbitration costs than you can hope to gain by the arbitration.” Furthermore, it is conceivable that the condemner could have manipulated the arbitration board in the following way. It could have first encouraged a higher than fair market value award by the arbitration board, by agreeing to the appointment as third arbitrator, a person known to be generally sympathetic to the condemnee. Then, when the

⁴⁰ *Id.*, proposed CAL. CODE CIV. PROC. § 1241.2(d).

⁴¹ *Ayer* 717.

condemnee's arbitrator and the third arbitrator agreed to a higher than fair market value, the condemner's arbitrator could have opposed. At this point, the condemner could ignore the arbitration award and threaten to go to court. The condemnee would then be faced with the strong possibility of being forced into court and having to pay litigation costs of both sides if the court award were less than the arbitration figure. Having already paid half of the arbitration costs, the condemnee would think twice before risking his cause in court. The condemner could in effect compel settlement at a lower figure than was originally offered. If the property owner did decide to take his chances and fight in court and the award of the court were less than the arbitration award, he would in the end have paid all court costs for both sides, half of the arbitration costs, and would have received only that to which he was entitled initially.

Assembly Bill 1290 failed to move out of the Assembly Judiciary Committee during the 1970 session. With the advantages of the bargaining position already possessed by the condemner in California,⁴² an extension of these powers seems unwarranted.

Assembly Bill 125

The California Law Revision Commission, after lengthy study, wrote a model statute to establish arbitration procedure to be used in eminent domain cases.⁴³ By amazing providence the bill moved through all committees of both the assembly and senate without a substantive amendment. It was passed by the legislature and signed by the Governor on July 14, 1970.

The new law establishes a flexible procedure for voluntary arbitration of compensation in condemnation situations. The most important provision of this legislation adds section 1273.02(a) to the Code of Civil Procedure.⁴⁴ It states: "Any person authorized to acquire property for public use may enter into an agreement to arbitrate any controversy as to the compensation to be made in connection with the acquisition of the property."⁴⁵ Part (b) of section 1273.02 also allows an arbitration settlement of a claim by a property owner whose property has already been taken or damaged.⁴⁶

The form of arbitration to be used is not specified. Therefore, if

⁴² See p. 249, *supra*.

⁴³ C.L.R.C. REPORT 130-36.

⁴⁴ A.B. 125, CAL. STATS. 1970, c. 417, Regular Session [hereinafter cited as *A.B. 125*].

⁴⁵ *Id.* at 1; C.L.R.C. REPORT 131-32.

⁴⁶ See note 45, *supra*.

desired by both parties, arbitration could consist of a formal three-member board of arbitrators in accordance with the rules of the American Arbitration Association.⁴⁷ However, if agreeable to both parties, the condemnee and condemner could simply choose a neutral appraiser and agree to abide by his appraisal,⁴⁸ which could preclude costly procedure and trial by combat.

The legislation also adds section 1273.03 to the Code of Civil Procedure, providing for the allocation of the costs of arbitration.⁴⁹ The condemner is liable for the cost of the neutral arbitrator and the statutory fees for witnesses subpoenaed "together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including attorney's fees or expert witness fees or other expenses incurred by other parties for their own benefit."⁵⁰ Subsection (b) stipulates that the condemner may agree to pay condemnee's other expenses. However, in all cases the condemner would be liable for the neutral arbitrator.

Section 1273.04 is added to the Code of Civil Procedure to provide for the enforceability of the arbitration agreement and its impact on eminent domain proceedings.⁵¹ It specifies that eminent domain proceedings are not required for arbitration to proceed and further that an agreement to arbitrate may be pursued even though an eminent domain proceeding is in process. This section also assures that

the effect and enforceability of an agreement authorized by this chapter is not defeated or impaired by contention or proof by any party to the agreement that the party acquiring the property pursuant to the agreement lacks the power or capacity to take the property by eminent domain proceedings.⁵²

The act treats abandonment and resulting liability in much the same way that the Code of Civil Procedure governs abandonment of judicial condemnation actions.⁵³ In addition, the new law provides for the re-

⁴⁷ See note 34, *supra*.

⁴⁸ C.L.R.C. REPORT 128, n.12.

Before 1961, an additional obstacle to arbitration existed. California judicial decisions had excluded valuations and appraisals from the coverage of the arbitration statute on the general grounds that they did not involve a 'controversy' and, additionally, because the parties did not necessarily contemplate either a formal hearing or the taking of evidence. *E.g.*, *Bewick v. Mecham*, 26 Cal. 2d 92, 156 P.2d 757 (1945). In revising the California Arbitration Act in 1961, the Legislature provided expressly that enforceable arbitration agreements include agreements providing for valuations, appraisals and similar proceedings. See CAL. CODE CIV. PROC. § 1280.

⁴⁹ A.B. 125; C.L.R.C. REPORT 132-33.

⁵⁰ See note 49, *supra*.

⁵¹ A.B. 125; C.L.R.C. REPORT 133-34.

⁵² See note 51, *supra*.

⁵³ C.L.R.C. REPORT 134-35.

Subdivision (a) of § 1273.04 permits the parties to the agreement to pro-

ording of the arbitration agreement or a memorandum thereof, which will work as constructive notice for a period of two years.⁵⁴

The new law can, if utilized by the parties involved, eliminate many of the inequities arising from our present system of determining just compensation.⁵⁵ The high cost of litigation is the major problem which prevents neutral determination of the issue in the case of the small property owner or one whose amount in dispute is small.⁵⁶ If they choose to proceed under the new legislation, the condemnee and condemner can agree to submit the question of value to a neutral appraiser and agree to accept his figure as final. In this case there would be no expensive hearings, large attorney's fees could be avoided, and the neutral arbitrator would be paid by the condemner, thereby relieving the condemnee of virtually any cost.⁵⁷ If the dispute involves a large sum of money and cost of litigation is not an overriding consideration, but a quick decision is desired by both parties, a formal three-man board of arbitration can be agreed upon. There can be the same hearings, and presentation of evidence, but there need not be the delay inherent in our present courts.⁵⁸ Arbitration by expert appraisers might tend to render this decision-making a more exact science, thereby avoiding unpredictable jury behavior.⁵⁹ Assuming that each party agrees to the arbitration in good faith, much of the ill will involved in condemnation actions might be avoided.

Objection to the New Arbitration Legislation

Various objections were raised by interest groups at committee hearings in both the assembly and the senate. The representative of the California Department of Public Works claimed that the proposed legislation would be unconstitutional.⁶⁰ He contended that article I,

vide whether and under what conditions the acquirer may abandon the acquisition. If the agreement does not so provide, the party who was to have acquired property may abandon the acquisition within the time within which a petition or response to vacate an arbitration award may be filed and served. Generally this period is 100 days after service of the award or 10 days after service of a petition to confirm an award. . . . Subdivision (b)—which makes clear that the right of the 'condemnee' to recover certain expenses is not subject to modification under the arbitration agreement—is consistent with § 1255(a) [of the Code of Civ. Proc.] which prescribes the rule governing abandonment of a judicial condemnation action.

⁵⁴ C.L.R.C. REPORT 135-36.

⁵⁵ See note 4, *supra*.

⁵⁶ C.L.R.C. REPORT 128.

⁵⁷ *Id.* at 129.

⁵⁸ *Id.* at 130.

⁵⁹ *Id.* at 129.

⁶⁰ Hearings on A.B. 125, before the California Assembly Judiciary Committee, February 16, 1970 [hereinafter cited as Assembly Judiciary Committee Hearings]. Testimony of Bob Carlson, attorney representing the California Department of Public Works.

section 14 of the California State Constitution established the exclusive method of determining just compensation. Therefore, he felt that any other way of reaching that decision would be unconstitutional.⁶¹ In answer, it was argued that arbitration is simply a method of negotiation.⁶² Settlement of compensation by negotiation has always been allowed; therefore, arbitration would not be unconstitutional. The Legislative Counsel's report upheld this view and the constitutionality of A.B. 125.⁶³

The most prevalent argument against the proposal was that it would interfere with an already good system. All the public agencies pointed with pride to their record of over 90% settlement by negotiation.⁶⁴ They felt that if this arbitration bill became law, more people would become dissatisfied with the offers made to them and would either demand arbitration or would force the issue into court. Assemblymen on the Assembly Ways and Means Committee wondered if the reason for alarm was the fact that the public agencies were afraid of losing their superior bargaining advantage and thereby having to pay truly fair market value for the land taken.⁶⁵ The response to this objection was that since the arbitration was strictly voluntary, agencies would not have to use it if they did not wish to.⁶⁶ Another contention of the opponents was that arbitration had been disallowed in certain *in rem* proceedings.⁶⁷ Since a condemnation action is an *in rem* action, it was argued that arbitration could not be used in such a dispute. The reply to this objection was that the arbitration agreement would be personal and would only apply to the personal interests of the parties to the agreement.⁶⁸

It was further asserted that if A.B. 125 passed, it would not in reality reduce the load on the courts.⁶⁹ It was felt by certain opponents that, even if the amount of compensation were arbitrated, it would still be necessary to go to court to enforce the agreement. While such enforcement proceedings might be necessary in a few cases, it is probable that most parties would abide by the results of the arbitra-

⁶¹ *Id.*

⁶² *Id.*, Testimony of John Demouly, representing the California Law Revision Commission.

⁶³ Report of the Legislative Counsel to the Assembly Judiciary Committee regarding A.B. 125.

⁶⁴ See note 3, *supra*.

⁶⁵ Ways and Means Committee Hearings, comments by Assemblymen Lanterman, Barnes, and Warren.

⁶⁶ *Id.*, Testimony of John Demouly, representing the California Law Revision Commission.

⁶⁷ Assembly Judiciary Committee Hearings, testimony of Bob Carlson representing the Department of Public Works. See *Estate of Carpenter*, 127 Cal. 582 (1900).

⁶⁸ Assembly Judiciary Committee Hearings, testimony of John Demouly representing the California Law Revision Commission.

⁶⁹ Assembly Judiciary Committee Hearings.

tion. The primary reason people desire arbitration is to avoid paying the cost of litigation. It is unlikely that they would refuse to convey their interest in the property, if in so doing they face litigation expenses.

While motivation is a subject for conjecture, it seemed to be the opinion of the proponents of the bill that the opponents of A.B. 125 were fighting passage because they feared adverse publicity if they should refuse to agree to arbitrate when such an agreement was desired by the property owner.

Another group opposing the bill was the California Trial Lawyers Association. They felt the courts and juries were doing a good job and that all persons were entitled to their day in court.⁷⁰ The representative for the trial lawyers pointed out that the legislature, the courts, and the Law Revision Commission have devised a set of rules of evidence that work well and should not be thrown out in favor of informal hearings.⁷¹ One senator observed that perhaps the trial lawyers were fearful of losing fees if arbitration were made available.⁷² The fact of the matter is that under the new legislation no one is being denied his day in court. If one of the parties feels that he would be better off in court, he may refuse arbitration and litigate. The trial lawyers also felt that if this method of arbitration were allowed, the condemner would pressure an uninformed condemnee into an unfavorable agreement.⁷³ This is perhaps the most valid criticism of all, and points up the continuing need for property owners to employ knowledgeable attorneys who can assure that their interests are protected. The new arbitration law stipulates that the condemner must pay for the neutral arbitrator, so that the property owner is partially protected from the cost of arbitration. An attorney retained to negotiate an acceptable agreement would cost much less than one retained to do battle in court.

A further problem is the availability of neutral appraisers competent to determine the fair market value of property. If a private appraiser wished to be considered for the position, he would have to be acceptable to the condemner, who normally would be a continuing client. On the other hand, the property owner would be a one-time-only client, whose influence would be small. The best solution to this dilemma would be for the parties to agree to a neutral appraiser

⁷⁰ Hearings on A.B. 125, before the California Senate Judiciary Committee, May 19, 1970. Testimony of Bill Chidlaw representing the California Trial Lawyers Association.

⁷¹ *Id.*

⁷² *Id.*, comment by Senator Song.

⁷³ See note 70, *supra*.

appointed by an appraiser's association.⁷⁴ In that event, the appraiser would not be as apt to be influenced by the need for future appraising jobs.

A further criticism of the new legislation is that arbitration could not be used where complex problems of title and disputed interest are involved.⁷⁵ The opponents claimed that arbitration could not settle such questions and court proceedings would therefore be required. The proponents answered this, as they did all criticisms, by pointing out that arbitration would be voluntary and if the condemner felt that the problems were too complex he could refuse to arbitrate.⁷⁶ Also, it would be natural in an arbitration agreement, if there were doubt as to title, to provide that the award would be paid only upon the condemnee conveying insurable title. It would, of course, be incumbent upon the condemner to investigate the title situation thoroughly as is now the case. Also, a trial could be shortened if only the dispute as to the title were decided by trial and the amount of consideration was decided by arbitration.

Strategy Considerations

In handling a condemnation dispute there are a number of factors to consider in determining which alternative to use to find "just compensation". Under arbitration allowed by the new law the decision as to compensation will normally be made by a professional appraiser or arbiter.⁷⁷ Such a professional would probably be far more inflexible in including special intangible values than would a jury. A jury would be more likely to include sentimental value. Therefore, if the litigation cost problem were not extreme and the property involved special intangible factors, a jury trial might be more advantageous.

Another strategic factor in a condemnation dispute is the determination of whether the person or agency desiring the property does in fact have the power to condemn the property. Conceivably a public agency without such power could threaten to condemn and by so doing pressure the property owner into signing an arbitration agreement. The new arbitration legislation specifically provides that the agreement cannot be defeated by a showing that the acquiring party lacked the power of eminent domain.⁷⁸ Therefore, in any such dispute in which

⁷⁴ *Ayer*, 717-26.

⁷⁵ Assembly Judiciary Committee Hearings. Testimony of Bob Carlson, representing the Department of Public Works.

⁷⁶ *Id.*, testimony of Assemblyman Moorhead.

⁷⁷ C.L.R.C. REPORT 129.

⁷⁸ *Id.* at 133-34.

the property owner does not want to sell, it is imperative to ascertain whether or not the acquirer has in fact the power to take by condemnation.

Conclusion

The provision in A.B. 125 which made arbitration strictly voluntary for both parties was largely responsible for the success of the bill in the legislature. The answer to all opponents of the proposed legislation, no matter what their objection, was; "Arbitration is voluntary." Now that the bill has been enacted into law, this provision is also what may well make the bill ineffective as an alternative to court action. If the public agencies should refuse to use arbitration in any form, the bargaining positions would remain the same. Therefore it would seem that in order to give the new law force, there must be some way of making it more attractive to the condemner. It would probably be impractical to require arbitration when demanded by the condemnee because there are valid reasons for not having arbitration in certain types of cases.⁷⁹ Something is needed which will force the condemner to arbitrate when arbitration is desired by the condemnee, and is practical. One possible approach would be to allow judges to award attorney's and appraiser's fees, plus court costs, to the condemnee if it can be shown that (1) the condemnee asked for arbitration in a reasonable form, and (2) that the facts of the dispute lend themselves to arbitration.

Thus, if the condemner was responsible for forcing the case to court without good cause, he could be liable for all of the condemnee's litigation costs. If the condemner could show that in fact this case was not suited to arbitration, the court should not award costs and attorney's fees to the condemnee. Such a solution might work in the proper situation to encourage the condemner to agree to reasonable arbitration and render the new legislation a real alternative to costly and time-consuming litigation.

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⁷⁹ In cases of complex title issues, or situations involving leasehold interests, or problems of personal vs. real property, a court trial may justifiably be desired by the condemner.