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2-1-1988

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Recommended Citation
William L. Corbett, *Arbitration in Montana and the Need for New Legislation* , 6 Mont. Law. 5 (1988),
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ARBITRATION IN MONTANA AND THE NEED FOR NEW LEGISLATION

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This article reviews the current legal status of arbitration in Montana and compares the Montana law with the Uniform Arbitration Act. Legislative Enactment of the Uniform or similar legislation is necessary to enable Montana to join the vast majority of states that permit and encourage effective private dispute settlement through arbitration.

I. Arbitration at Common Law.

To clearly understand the current Montana law on arbitration it is necessary to understand arbitration at common law. This is due to the fact that arbitration law in Montana has changed little in the last one hundred years.

At common law arbitration was viewed with much disfavor by the courts. The courts believed that they should not be ousted of their traditional role in dispute settlement by private tribunals, nor should parties to a contract be deprived of access to the courts. As a consequence, arbitration clauses were almost universally held to be void and unenforceable. *Palmer Steel Structures v. Westech, Inc.*, 35 S.Rept. 1354, 1358(B) dissenting opinion (1979) *School Dist. No. 1 v. Globe and Republic Ins. Co.*, 146 Mont. 208, 212 (1965). See Note, *Contract Clause Providing For Arbitration Of Future Disputes Is Not Enforceable In Montana*, 24 Mont. L. Rev. 77 (1963).

At common law, the courts generally **recognized** but did **not necessarily enforce** three distinct types of arbitration clauses:

(1) An agreement to arbitrate a dispute **existing** at the time the agreement is entered. These provisions were valid and enforceable only after the subject was actually arbitrated, but a party would be denied a court order enforcing the contractual duty to arbitrate.

(2) An agreement to arbitrate a **future factual** dispute (a **factual** dispute not in existence at the time of the agreement was entered but which might arise in the future). These provisions were considered valid because the courts were not ousted of their jurisdiction over issues of law.

(3) An agreement to arbitrate **any future** dispute (fact or law). These agreements were uniformly held to be void and unenforceable because the courts were ousted of their jurisdiction over legal issues and it was believed that the parties should not be deprived of their access to the courts.

II. Arbitration in Montana.

A. Arbitration in commercial disputes.

In 1867 the Montana legislature enacted a statute which upon first reading appears to have reversed the common law bias against arbitration. The statute provides that "persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them . . . . 27-5-101 MCA. Despite the potentially broad reading this statute might be given, the Montana Court, in conformity with jurisdictions with similar legislation, interpreted the statute to provide for judicial enforcement of an arbitration provision only when the dispute is in existence at the time the agreement is entered. *Green v. Wolff*, 140 Mont. 413, 423 (1962). Thus, under the statute, an agreement to arbitrate only an **existing** dispute is valid and enforceable.[1] In addition to the statute, the Montana Court continued the common law notion that an agreement to arbitrate any **future factual** dispute was valid and enforceable (category #2 discussed above). Moreover, the Court recognized that an arbitration award under a valid and enforceable arbitration agreement is binding on the parties.[2] See *Palmer Steel Structures v. Westech, Inc., supra,* 35 S. Rept. at 1357.

However, the major obstacle to arbitration remained. The Montana Court continued to follow the common law rationale that an agreement providing for the arbitration of a **future** dispute involving an issue of law was unenforceable (category ÷3). *Palmer Steel Structures v. Westech, Inc. supra,* 35 St. Rept. at 1357.

Unlike Montana, many jurisdictions early came to the realization that if an agreement providing for arbitration of **existing** disputes involving issues of **law** were enforceable, it would not violate public policy to make enforceable an agreement to arbitrate a **future** dispute involving an issue of **law.** These courts realized that even if the award of an arbitrator were to be based on an issue of law, the award was not enforceable until a court, with an opportunity to review the legal rationale, enforced the award. *See Ezell v. Rocky Mountain Bean & Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925). However, these jurisdictions, unlike Montana, were not faced with a legislative mandate prohibiting the development of arbitration away from its common law limitations.

In 1895 the Montana legislature enacted a statute that codified the existing common law notion that courts cannot be denied their traditional jurisdiction over dispute set-

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tlement by agreements of the parties. *School Dist. No. 1 v. Globe & Republic Ins. Co., supra* 146 Mont. at 212.[3] This 1895 statute has been consistently interpreted by the Montana Court to make unenforceable an agreement to arbitrate **future** disputes unless the arbitration provision is limited to the determination of solely **factual** issues. *Palmer Steel Structures v. Westech, Inc., supra,* 35 St. Rept. at 1356-1357.[4]

The Montana Court has indicated that such a narrow conception of arbitration is not truly arbitration but merely judicial recognition of commercial appraisal. *School Dist. No. 1 v. Globe & Republic Ins. Co., supra* 146 Mont. at 213. Thus, what is often referred to as arbitration in Montana is nothing more than legal recognition and enforcement of appraisal agreements in a commercial setting.

B. Arbitration in Labor Disputes.

Frequently a collectively bargained contract between an employer and a union will include a provision for dispute settlement ending in arbitration.[5] In view of the limited scope of arbitration in the commercial setting, the question arises whether the agreed method of labor dispute settlement will fare any better. Because the arbitration machinery in the labor agreement anticipates the resolution of all (factual and legal) future disputes, it could be argued that these arbitration agreements will meet with the same fate as found in commercial contracts. However, this is not the case.

Section 301 of the National Labor Relations Act provides that a suit for violation of a labor contract involving a private sector employer engaged in interstate commerce may be brought in a Federal District Court (with state court concurrent jurisdiction) without regard to the amount in controversy or diversity. 29 USCA 185(a). The great majority of cases brought under § 301 are actions to enforce agreements to arbitrate and actions to enforce (or set aside) arbitration awards rendered. Additionally, under § 301 a federal court can by declaratory relief rule that an employer is not required to arbitrate under the specific contract provisions. Gorman, Robert A., *Basic Text on Labor Law Unionization and Collective Bargaining,* 547 (1976).

Accordingly, if a Montana private sector employer engaged in interstate commerce agrees to the arbitration of labor disputes, federal law provides for the enforcement of the agreement. The federal law, unlike Montana, does not limit arbitration of future disputes to solely the resolution of factual disputes.

If the arbitration clause is included in a labor agreement involving a Montana **public** employer (not subject to the federal legislation), it also appears that the clause will be enforced without regard to the limitations found in commercial arbitration. The Montana Collective Bargaining For Public Employees Act provides that nothing "prohibits the parties from voluntarily agreeing to submit **any** and **all** of the issues to final and binding arbitration," and any "agreement to arbitrate, and the award issued . . . shall be enforceable in the same manner **as is provided in the act for enforcement of collective bargaining agreements.**" (Emphasis added.) 39-31-310 MCA. Thus, the legislature provided for enforcement of public employment arbitration provisions in the same manner as the enforcement of the collective bargaining agreement in which the provision is included. The problem is that the legislature did not (forget to?) include a provision in the Act concerning the enforcement of the collective bargaining agreement.

However, this is not a significant problem. Collective bargaining agreements are universally enforced in the same manner as any other contract.[6] It is not reasonable to assume the Montana legislature intended any other procedure. If the legislature intended that "any and all" arbitration clauses would be enforced as collective bargaining agreements, and collective bargaining agreements are traditionally enforced as any other contract, then the only reasonable conclusion is that the legislature intended arbitration provisions to be fully enforced without the limitations found in commercial law.

The need to treat labor arbitration differently than commercial arbitration has long been recognized. The United States Supreme Court has noted that in the commercial setting arbitration is the substitute for industrial strife. Given this distinction, the Court stated since "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574, 578 (1960). It appears that the Montana legislature recognized this distinction and clearly intended that public employee labor arbitration be fully enforceable.

While the Montana Court has not spoken directly on this issue, two recent opinions assumed the traditional broader position for labor arbitration. However, the Montana Court, without discussing any conflict, upheld a District Court order requiring the employer to arbitrate what appears to be clearly an issue of **law** under an arbitration clause requiring the arbitration of **future** disputes, *Butte Teachers Union v. Bd. of Ed.,* 34 St. Rept. 726, 730 (1977). In another case, the Court assumed that if the grievance came within the grievance procedure the union could compel the employer to arbitrate the quasi-legal question of "just cause" as required by the contract grievance procedure, *Wibaux Education Association v. Wibaux County High School,* 35 St. Rept. 93 (1978). Moreover, if the Court were to directly speak on the issue, should certainly place much weight on the expressed legislative intent, especially in light of the universally recognized distinction between labor and commercial arbitration.

Accordingly, with labor arbitration provisions involving a Montana employer engaged in interstate commerce fully enforceable under federal law, and such provisions involving a Montana public employer enforceable under the Montana Public Employee Bargaining Act, the vast majority of labor arbitration provisions will be enforceable without regard to the limitations applied to commercial arbitration. For those few Montana solely intrastate employers who have a labor agreement providing for arbitration, it can be argued that the arbitration provi-

sion should be fully enforceable without regard to the limitations imposed on commercial arbitration, based upon the universally recognized distinction between labor and commercial arbitration. However, given the fact that Montana, unlike most jurisdictions, has a specific statutory limitation on arbitration, this argument might very well be rejected. *See Smith v. Zepp, supra* 34 St. Rept. 753, 761 (1977). Thus, an arbitration agreement involving a solely intrastate private employer might very well be subject to the limitations found in commercial arbitration while no such limitation would be applied to a similar agreement involving an interstate or public employer.

III. Comparison Between the Uniform Arbitration Act and Montana Law.

A summary analysis of the Uniform Arbitration Act and a comparison with current Montana law can conveniently be presented under three headings: (1) which agreements to arbitrate would the model act apply; (2) the judicial procedure applicable in the enforcement of arbitration agreements and arbitration awards; and (3) the hearing procedure used by arbitrators.

1. Agreements Covered.

As previously discussed, current Montana law provides that agreements to arbitrate future disputes involving legal issues are unenforceable. The Model Act eliminates this limitation. The Model Act provides for the enforcement of a written agreement to submit any existing controversy, or a written contract provision to submit any controversy thereafter arising between the parties regardless whether the issue is legal or factual. Uniform Arbitration Act §1. (Hereafter cited as U.A.A.)[11] The Model Act also specifically applies to labor arbitration agreements, unless the parties specify otherwise. The equal treatment for both commercial and labor arbitration under the Model Act eliminates the present confusion in Montana law on this subject. See U.A.A. § 31.

2. Enforcement Procedure.

The Model Act provides that upon motion to the court (a court of competent jurisdiction in the state, e.g., a Montana District Court), a party may seek an order directing arbitration. The order must be granted if the court finds that there is an agreement to arbitrate covering the dispute in question and that the opposing party refuses to arbitrate. U.A.A. § 2(a). In the event there is an action or proceeding involving the issue pending before the court, the court must stay that action or proceeding, or sever the arbitrable issue from that action or proceeding. U.A.A. § 2(c) and (d). The purpose of staying the action or proceeding or severing the arbitrable issue from the action or proceeding is to prevent the court from preempting the arbitration process. The Model Act also provides that a court may not refuse an order for arbitration because the court believes the issue lacks merit. U.A.A. § 2(e). Whether the party seeking arbitration raises a meritorious issue is to be left to the decision of the arbitrator and the arbitration process must not be preempted by the court. Thus, when a party seeks a court order enforcing an arbitration provision, the court need only concern itself with whether there is a valid arbitration agreement and whether the agreement covers the dispute in question. Whether the issue raised has merit is left to the arbitrator. Current Montana law is in substantial agreement with these provisions of the Model Act.[8]

The other major area of judicial intervention concerns the enforcement of the award. The Model Act follows the traditional motions to confirm, vacate, correct or modify the award of the arbitrator. U.A.A. §§ 11, 12, 13. This corresponds to the method used in Montana. Compare MCA §§27-5-203 through 27-5-302 with §§ 11, 12 and 13 of the Model Act.[9]

The Model Act provides that the court shall vacate an award on five separate grounds.[10] The Montana statute provides that a court **may** vacate an award under similar circumstances. Compare 27-5-301 MCA with U.A.A. § 12. Other than the compulsory language in the Model Act requiring the Court to vacate and the permissive language of the Montana Act, there is little substantive difference between the two provisions.[11] Moreover, the Montana Court has recognized that its scope of review under **common law** arbitration is narrow, and its authority to vacate an award is limited to situations similar to those set forth in the Montana statute and the Model Act. *McIntosh et al. v. Hartford Fire Ins. Co.,* 106 Mont. 434, 439-440 (1930). *See also Lee v. Providence Washington Ins. Co.,* 82 Mont. 264, 274-275 (1928); *Clifton Applegate - Toole v. Drain Dist. No. 1,* 82 Mont. 312, 328-9 (1928). Accordingly, the Model Act does not represent a sharp departure from current Montana law on this subject.[12]

3. Arbitration Hearings.

Dean Pirsig, the leading draftsman of the Model Act, has indicated that the goal of the arbitration hearing procedure in the Model Act "was to safeguard the essentials of a fair hearing without detracting from the informality, the freedom from technicality, and the dispatch which characterize arbitration hearings and which are commonly important reasons why the parties have agreed to resort to arbitration," Pirsig, *supra* note 12 at 118. The hearing procedure set forth in the Model Act meets this important goal. While, in comparison with the Montana Act, the Model Act specifically provides for more procedural options [13] and procedural safeguards,[14] these provisions are not inconsistent with the Montana Act or the decisions of the Montana Court. The Model Act merely goes further to assure that the arbitration process will be workable and fair.

IV. Conclusion.

Twenty two states and the District of Columbia have adopted the Model Act. Most other states have statutes similar to the Model Act or judicial decisions affording full use of the arbitration process as a method of private dispute settlement. Given the present Montana statutory framework that locks in the out of date, universally rejected common law view of arbitration, the Montana legislature must act if Montana is to have a truly effective method of extra-judicial dispute settlement. The Montana Court has similarly recognized that although "arbitration may be the most speedy and economical means available to parties for a binding resolution of their disputes," full utilization of this method cannot be made until the legislature acts. *Smith v. Zepp, supra* 34 St. Rept. 761. In an era of

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crowded dockets and lengthy and expensive litigation, methods supporting private settlement of disputes should be encouraged. The Model Act or some tailored form of the Model Act is the best method to achieve this goal.

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Mr. Corbett received his B.S. from the University of Wyoming, in 1967, his J.D. from the University of Wyoming in 1970, his LL.M. from Harvard University, in 1971. He was Attorney, Appellate Court Div., Office of the General Council, National Labor Relations Board, from 1971 to 1974.

FOOTNOTES

Fourteen footnotes, which include complete citations as well as explanatory material, accompany this article. Because of space limitations, the text of these footnotes has been deleted. However, copies of the text of the footnotes are available upon request from the writer or the Montana Bar, and the footnote numbers have been left in the text of the article for the convenience of those who wish to make such a request.

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one-year "observer" apprenticeship, each candidate is placed on a panel of judges, but there the President of the panel reigns supreme. If Mr. President wants an opinion from a panel member, he will ask for it. It is that simple. Not until the candidate has himself been assigned as a President will he really be an active judge, and that time depends upon future vacancies and the academic standards of the candidate. The appointments are for life. They carry great social prestige and command the highest incomes in the profession. Ironically, the production of such high calibre public servants has lead to numerous physical attacks and assassinations. The underworld has learned that these persons cannot be intimidated, swayed or bought so it is resorting to terrorism to try to achieve it's goals. Strangely enough, the profession considers this a high compliment and is prepared to stand firm.

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