

January 1985

## The Arbitration Alternative: Its Time Has Come

Jean E. Faure

*University of Montana School of Law*

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

---

### Recommended Citation

Jean E. Faure, *The Arbitration Alternative: Its Time Has Come*, 46 Mont. L. Rev. (1985).

Available at: <https://scholarworks.umt.edu/mlr/vol46/iss1/9>

This Comment is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

# THE ARBITRATION ALTERNATIVE: ITS TIME HAS COME

Jean E. Faure

## I. INTRODUCTION

The costs of resolving disputes through ordinary litigation are significant, and the real costs of litigation are often more than pecuniary. Parties frequently emerge from a lawsuit drained emotionally and financially; frustrated with the length of time it takes to decide a claim, the costs involved, the ponderous procedure; and confused about what the results are supposed to be. The need for conservation of judicial and attorney resources is also manifest. While complementing the judicial system, arbitration provides a workable solution outside the formal legal process, offering equitable and accessible resolution of disputes.

This comment examines arbitration, not as a panacea for all judicial ills, but as one alternative. It will explore the history of arbitration, the Uniform Arbitration Act, the federal alternative under the United States Arbitration Act, and the status of the law in Montana. In showing that Montana law impedes the use of arbitration, this comment will argue the advantages of arbitration as a means of dispute resolution. Because lack of knowledge equates with hostility, the procedure of arbitration will also be discussed.

## II. THE NATURE OF ARBITRATION

Arbitration is the reference of a dispute to one or more impartial persons for final and binding determination. It is private and informal, designed for quick, practical, and inexpensive settlements.<sup>1</sup> But at the same time, arbitration is an orderly proceeding, governed by rules of procedure and standards of conduct prescribed by law.<sup>2</sup>

"Arbitration is a creature of contract. The powers of the arbitrators are defined by the contract providing for arbitration and little else."<sup>3</sup> Where there is a broad provision for arbitration, the Uniform Arbitration Act<sup>4</sup> "and most state arbitration statutes em-

---

1. AMERICAN ARBITRATION ASSOCIATION, A COMMERCIAL ARBITRATION GUIDE (1979).

2. *Id.* at 2.

3. Kreindler, *Write Your Own Remedy*, 10 LITIGATION 31 (1983).

4. Promulgated by the Conference of Commissioners on Uniform State Laws in 1955, the Uniform Arbitration Act has been enacted in 26 states. The general advantage of the UAA is that it endows agreements to arbitrate with the same legal protections that other

power the arbitrators to grant virtually any relief or fashion any remedy they deem equitable, even though a court would not grant the relief."<sup>5</sup>

Arbitration is distinguishable from other forms of alternative dispute resolution. Arbitration "modifies the traditional, adversarial process of litigation but incorporates substantially the same operating assumptions of the adversarial process."<sup>6</sup> Arbitration is not mediation, a process in which a neutral intervenor assists negotiating parties in reaching mutually acceptable terms of settlement.<sup>7</sup> It is not fact-finding, a process in which a neutral intervenor conducts a hearing regarding the circumstances which led to the impasse between the negotiating parties,<sup>8</sup> nor is it facilitation, a process in which a neutral intervenor manages the discussion process.<sup>9</sup>

[Arbitration does] not tamper with the governing assumption of the adversarial process: that an advocate is responsible for separately marshalling pertinent evidence, presenting the case in the light most favorable to her client's outcome, and ultimately convincing the third-party decision-maker that her client's claim should prevail over that of the opponent.<sup>10</sup>

An arbitration proceeding, while similar to a lawsuit in some respects, is different in others. The proceeding takes place in a forum selected by the parties in lieu of a court of justice. The object is to avoid what some feel to be the formalities, the delay, the expense, and the vexation of ordinary litigation.<sup>11</sup> Arbitration depends for its existence and for its jurisdiction upon the parties' contract and upon the arbitration statute.<sup>12</sup>

An arbitration hearing is not a trial. Under the Uniform Arbitration Act [UAA],<sup>13</sup> parties have the right to present material evidence, cross-examine witnesses and be represented by a lawyer. The arbitrator has the authority to subpoena documents and wit-

---

legitimate private agreements have.

5. Kreindler, *supra* note 3.

6. Stulberg, *Negotiation Concepts and Advocacy Skills: The ADR Challenge*, 48 ALB. L. REV. 719, 720 (1984).

7. *Id.* at 721. Mediation is an advisory function, whereas arbitration is a judicial function. Mediation recommends, arbitration decides.

8. *Id.* The decision of the referee does not determine the issue but only constitutes a report on the facts.

9. *Id.*

10. *Id.* at 720.

11. Cook, *A Quest for Justice: Effective and Efficient Alternative Dispute Resolution Processes*, 1983 DET. C.L. REV. 1129, 1129-31.

12. Annot., 12 A.L.R.3d 892 (1967).

13. UNIF. ARBITRATION ACT, 7 U.L.A. 1 (1978) [hereinafter cited as UAA].

nesses, but otherwise the court rules of procedure and evidence generally do not apply.<sup>14</sup> "The arbitrator is restrained only from giving undue weight to hearsay evidence, and improper or insubstantial evidence."<sup>15</sup> "Arbitration is basically designed to be an informal hearing where the decision-maker listens to all the evidence bearing on the dispute and makes a decision which serves as an expeditious and final resolution of the matter."<sup>16</sup>

### III. THE HISTORY OF ARBITRATION

While arbitration was not historically favored at common law, it was in use many centuries before the beginning of English common law.<sup>17</sup> Indeed, one court has called arbitration "the oldest known method of settlement of disputes between men."<sup>18</sup> The courts' reluctance to lend their authority to the enforcement of arbitration clauses was due in part to the fact that such an agreement tends to circumvent the court's jurisdiction. When parties agreed to arbitrate, they by-passed the court system, an act which the courts did not want to encourage. Consequently, arbitration clauses were almost universally held to be void and unenforceable.<sup>19</sup>

At common law, courts recognized, but did not necessarily enforce, three distinct types of arbitration provisions:<sup>20</sup>

(a) An agreement to arbitrate an existing dispute. This was enforceable only upon the completion of arbitration; parties were denied court orders to enforce the contractual obligation to arbitrate.<sup>21</sup>

(b) An agreement to arbitrate a future factual dispute. Courts would enforce these provisions because they were not ousted of their jurisdiction over questions of law.<sup>22</sup>

(c) An agreement to arbitrate any future dispute. These agreements were uniformly held to be void and unenforceable because the courts were ousted of their jurisdiction and it was believed

14. *Id.* at 44.

15. F. ELKOURI, *HOW ARBITRATION WORKS* 254 (1973).

16. MacLean, *Voluntary Arbitration as an Alternative to Litigation*, 10 *COLO. LAW.* 1300, 1302 (1981).

17. Murray, *Arbitration in the Anglo-Saxon and Early Norman Periods*, 16 *ARB. J.* 193, 194 (1961).

18. *McAmis v. Panhandle Pipe Line Co.*, 23 *Lab. Arb. (BNA)* 570, 574 (1954) (Sperry, Arb.).

19. Corbett, *Arbitration in Montana and the Need for New Legislation*, 6 *MONT. LAW.* 5 (February 1981).

20. *Id.*

21. *Id.*

22. *Id.*

that the parties should not be deprived of their access to the courts.<sup>23</sup>

The validity of the arbitration agreement is not affected by the hostility of the law, but at common law, an arbitration agreement is revocable at will by each party any time before the award is rendered. As a result, arbitration agreements at common law mean very little because they are not subject to specific enforcement.<sup>24</sup>

Lawyers, too, are reluctant to consider the use of arbitration. This may be because their training in the adversarial system tends to lead them directly from the dispute to court. In law school, students are constantly reminded that the adversary process provides the foundation for our legal system. Lawyers also frequently "believe that anything less than full exercise of the procedural rights provided by the judicial process affords the client less than full and complete protection."<sup>25</sup> Finally, a basic lack of familiarity with the arbitration process makes many lawyers unreceptive.

In 1925, the United States Congress enacted the United States Arbitration Act<sup>26</sup> [USAA] to deliberately alter the judicial hostility. The report of the House Committee stated in part: "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him."<sup>27</sup>

This trend toward arbitration has not waned. Chief Justice Warren Burger in his 1982 annual address to the American Bar Association told lawyers that they must consider "moving some cases from the adversary system to administrative processes," concentrating on arbitration as "one example of a better way to do it."<sup>28</sup> The country's exploding litigation crisis demands alternatives to judicial resolution of disputes.<sup>29</sup> Burger said both lawyers and judges have been at fault for underuse of arbitration, judges "fearing that it would deprive them of their jurisdiction" and lawyers "mistakenly fearing that arbitration would adversely affect their practice."<sup>30</sup>

23. *Id.*

24. *S.M. Wolff Co. v. Tulkoff*, 9 N.Y.2d 356, 214 N.Y.S.2d 374, 377 (1961).

25. *MacLean*, *supra* note 16, at 1302.

26. 9 U.S.C. §§ 1-14 (1982) [hereinafter cited as USAA].

27. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) (quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924)).

28. *Middleton, Burger: Arbitrate More and Litigate Less*, 68 A.B.A.J. 257 (1982).

29. *Id.*

30. *Id.*

Forty-two states, the District of Columbia, and Puerto Rico enforce at least some form of agreement to arbitrate future disputes.<sup>31</sup> In the twenty-six states which have adopted the UAA,<sup>32</sup> "the subject matter of an arbitration agreement is virtually unlimited, except when the contract itself might be unenforceable under special statutes or public policies."<sup>33</sup> In some other states, including some otherwise hospitable to arbitration, certain categories are excluded from arbitration.<sup>34</sup>

A number of states<sup>35</sup> have enacted compulsory arbitration statutes. Compulsory arbitration comes about when the legislature declares that certain controversies must be resolved by arbitration. In the Eastern District of Pennsylvania, for instance, arbitration is compulsory in civil cases when money damages are not in excess of \$50,000 or the action is on a negotiable instrument or contract.<sup>36</sup> In *Kimbrough v. Holiday Inn*,<sup>37</sup> the court upheld the constitutionality of the arbitration rule. The court held that compulsory arbitration with a right to demand trial de novo after an arbitration award did not violate the seventh amendment right of trial by jury and did not violate the constitutional guarantees of due process and equal protection.<sup>38</sup>

Most commercial arbitration is governed by the USAA, which applies to all transactions involving commerce or admiralty.<sup>39</sup> Congress, in mandating the enforcement of arbitration agreements, has expressed a national policy in favor of arbitration. This national policy has gone so far as to withdraw from states the power to require judicial resolution of disputes.<sup>40</sup> In *Southland Corp. v. Keating*,<sup>41</sup> the United States Supreme Court held that the USAA pre-

31. G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 6-7 (1983).

32. Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Wyoming.

33. GOLDBERG, *supra* note 31, at 7. Illegality of a contract may render an arbitration clause unenforceable.

34. *Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n*, 45 N.Y.2d 411, 380 N.E.2d 280, 408 N.Y.S.2d 453 (1978); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

35. Alabama, for example, has compulsory arbitration in areas of certain real estate leases and school district annexation disputes. See ALA. CODE § 16-8-21 (Supp. 1984). Connecticut, California, and Pennsylvania have also passed compulsory arbitration programs.

36. Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A.J. 64 (1983).

37. 478 F. Supp. 566 (E.D. Pa. 1979).

38. *Id.*

39. 9 U.S.C. §§ 1-14 (1982).

40. *Southland Corp. v. Keating*, 104 S. Ct. 852 (1984).

41. *Id.*

empted a California statute requiring judicial consideration of claims brought under that statute. The USAA, resting on Congress' authority under the commerce clause, creates a body of federal substantive law that is applicable in both state and federal courts.<sup>42</sup>

The *Southland* Court interpreted the language of the Federal Act to go beyond the notion of application strictly to interstate commerce. Indeed, as the Court noted:

Since the overwhelming proportion of civil litigation in this country is in the state courts, Congress could not have intended to limit the Arbitration Act to disputes subject only to federal court jurisdiction. In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.<sup>43</sup>

Under the USAA, the only issue that may be decided by a court is whether a valid agreement to arbitrate exists. "If it exists, all other issues, even a claim that the contract containing the arbitration clause was induced by fraud, are for the arbitrators to determine."<sup>44</sup> When commerce or admiralty is involved, "an arbitration agreement will be enforceable even in a state whose laws disapprove of arbitration."<sup>45</sup> Restrictive state statutes also will be invalid.<sup>46</sup> If the underlying transaction does not involve commerce or admiralty, the federal courts must apply the law of the forum state.<sup>47</sup>

42. *Id.* at 854.

43. *Id.* at 860-61.

44. GOLDBERG, *supra* note 31, at 12; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Griffin v. Semperit of Am., Inc.*, 414 F. Supp. 1384 (S.D. Tex. 1976); this is also the law in some states, *e.g.*, *Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am.*, 37 N.Y.2d 91, 332 N.E.2d 333, 371 N.Y.S.2d 463 (1975), but not all states, *e.g.*, *Atcas v. Credit Clearing Corp. of Am.*, 292 Minn. 334, 197 N.W.2d 448 (1972).

45. GOLDBERG, *supra* note 31, at 12; *C.P. Robinson Constr. Co. v. National Corp. for Hous. Partnership*, 375 F. Supp. 446 (M.D.N.C. 1974); *Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169 (S.D.N.Y. 1973); *Austin v. A.G. Edwards & Sons, Inc.*, 349 F. Supp. 615 (M.D. Fla. 1972).

46. *Medical Dev. Corp. v. Industrial Molding Corp.*, 479 F.2d 345 (10th Cir. 1973); *Cooper v. Computer Credit Sys., Inc.*, 40 A.D.2d 692, 336 N.Y.S.2d 380 (1972); *Aerojet-General Corp. v. Non-Ferrous Metal Ref., Ltd.*, 37 A.D.2d 531, 322 N.Y.S.2d 33 (1971); *Mamlin v. Susan Thomas, Inc.*, 490 S.W.2d 634 (Tex. Civ. App. 1973).

47. *Erie v. Tompkins* 304 U.S. 64 (1938); *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198 (1956); *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941); *O'Meara v. Texas Gas Transmission Corp.*, 230 F. Supp. 788 (N.D. Ill. 1964).

## IV. ARBITRATION IN MONTANA

In light of *Southland v. Keating*,<sup>48</sup> Montana's anti-arbitration statute<sup>49</sup> may very well be a violation of the supremacy clause and hence, invalid. Unlike the overwhelming majority of states, Montana does not allow parties to arbitrate future disputes of law. Montana Code Annotated provides in part that "persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them except a question of title to real property in fee or for life."<sup>50</sup> In interpreting this statute, the Montana court provided for judicial enforcement of an arbitration provision *only* when the dispute is in existence *at the time* the agreement is entered.<sup>51</sup> Thus, only an agreement to arbitrate an existing dispute is valid and enforceable.

The common law validity of an agreement to arbitrate any future factual dispute has also been recognized by the Montana court.<sup>52</sup> These provisions are considered valid because the courts are not ousted of their jurisdiction over issues of law. Parties can then agree to submit any factual controversy arising between them to arbitration.<sup>53</sup> The Montana court has indicated that such a limited use of arbitration is not truly arbitration but merely judicial recognition of commercial appraisal.<sup>54</sup>

The impediment to arbitration of future disputes is found in Montana Code Annotated which states: "Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals . . . is void."<sup>55</sup> This statute has been interpreted by the Montana court to prohibit contract provisions whereby the parties agree to arbitrate future disputes as to questions of law.<sup>56</sup>

Due to the statutory nature of arbitration in Montana, case law is accordingly scant. The court has consistently shown deference to legislative authority, voiding contractual provisions which allow for arbitration of future contract disputes.<sup>57</sup> Ironically, as early as 1938, the court favored the settlement of disputes by arbi-

---

48. 104 S. Ct. 852 (1984).

49. MONT. CODE ANN. § 28-2-708 (1983).

50. MONT. CODE ANN. § 27-5-101 (1983).

51. *Green v. Wolff*, 140 Mont. 413, 423, 372 P.2d 427, 433 (1962).

52. *Palmer Steel Structures v. Westech, Inc.*, 178 Mont. 347, 584 P.2d 152 (1978).

53. *Corbett*, *supra* note 19, at 5.

54. *School Dist. No. 1 v. Globe Republic Ins. Co.*, 146 Mont. 208, 404 P.2d 889 (1965).

55. MONT. CODE ANN. § 28-2-708 (1983).

56. *Smith v. Zepp*, 173 Mont. 358, 567 P.2d 923 (1977).

57. *Id.*



tration,<sup>58</sup> but was unable to give effect to parties' agreements to arbitrate. It is manifestly clear that the court favors arbitration. In *Smith v. Zepp*,<sup>59</sup> the court recognized arbitration as perhaps "the most speedy and economical means available to parties for a binding resolution of their disputes."<sup>60</sup>

#### V. ADVANTAGES OF ARBITRATION

Because Montana law severely restricts the use of arbitration for the resolution of disputes, parties may not take advantage of what may be "the most speedy and economical means available." Given the progressive increase in case filings on the district court level in Montana, it would seem appropriate to exhaust other avenues of resolution such as arbitration.<sup>61</sup>

The advantages of arbitration are many. The parties can select arbitrators who are familiar with the practices and customs of the trade and with such matters as current prices, merchantable quality, and terms of sale.<sup>62</sup> This feature of arbitration cannot help but produce advantages both to the parties and to the public. The parties benefit because there is no need to spend valuable time acquainting a judge and jury with the background, customs, and usage and technical intricacies of an industry.<sup>63</sup> The public benefits because there is no need to appropriate funds for the support of such a tribunal.<sup>64</sup> In fact, arbitration costs taxpayers nothing.

Further impetus for arbitration stems from the fact that the judicial process is often an inappropriate forum for resolving a number of disputes.<sup>65</sup> "The highly repetitive and routine task involving application of established principles to a large number of individual cases" could be handled by a speedier and less cumbersome procedure than litigation.<sup>66</sup> When an issue has been fairly well confined by a contract between the parties, by governing legislation, or by a prior court decision, parties need to give arbitration stronger consideration.<sup>67</sup> Specialized issues also are handled effectively through arbitration.

The economics of litigation are such that the amount in con-

---

58. *McIntosh v. Hartford Fire Ins. Co.*, 106 Mont. 434, 78 P.2d 82 (1938).

59. 173 Mont. at 369, 567 P.2d at 929.

60. *Id.*

61. Haswell, *The State of the Judiciary*, 6 MONT. LAW. 8 (February 1981).

62. D. BLOOMFIELD, *COMMERCIAL ARBITRATION* xiii (1927).

63. *Id.* at xiii-xviii.

64. *Id.*

65. MacLean, *supra* note 16, at 1301.

66. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 118-19 (1976).

67. *Id.* at 128.

troverly may in reality disqualify many disputes from the judicial process.<sup>68</sup> Even if the amount in controversy is high, the costs of litigation may still be prohibitive if extensive discovery is required.<sup>69</sup> By contrast, the costs of arbitration are usually substantially less than the costs of a fully litigated case. If the arbitration is administered by the American Arbitration Association [AAA],<sup>70</sup> a sliding scale is used.<sup>71</sup> Fees for private arbitrators usually range from \$200 to \$500 per day, including time spent in pre-hearing conferences, in researching, and in writing the decision.<sup>72</sup>

In Montana courts, cases take from one to three years to reach trial. Complex litigation typically takes longer because of the extent of the discovery involved. Most litigated cases take at least a week and not uncommonly longer to try. "The personnel commitment, which is essential for this kind of trial, and especially the breadth and depth of the preparation, represents a huge demand and enormous drain on parties' time and energy."<sup>73</sup> An arbitration hearing, on the other hand, can be completed in two days. The average hearing is scheduled for a half day.<sup>74</sup>

Arbitration provides the confidentiality that the normal judicial process cannot. When adverse parties accede to an arbitration hearing, they need not resort to any official judicial program for resolution of their disputes.<sup>75</sup> Attendance by the press is hardly likely; in fact, parties can arbitrate in almost complete secrecy,

68. MacLean, *supra* note 16, at 1304.

69. *Id.*

70. The American Arbitration Association [hereinafter cited as AAA] is a private non-profit association which was organized in 1926 under the New York Membership Corporation Law. It operates 25 regional offices in 18 states: Arizona (Phoenix); California (Los Angeles, San Diego, San Francisco); Colorado (Denver); Connecticut (Hartford); District of Columbia; Florida (Miami); Georgia (Atlanta); Illinois (Chicago); Massachusetts (Boston); Michigan (Detroit); Minnesota (Minneapolis); North Carolina (Charlotte); New Jersey (Somerset); New York (Garden City, New York City, Syracuse, White Plains); Ohio (Cincinnati, Cleveland); Pennsylvania (Philadelphia, Pittsburgh); Texas (Dallas); Washington (Seattle). The AAA will provide for administration of arbitrations conducted under its rules anywhere in the United States.

71. The administrative fee of the AAA is based upon the amount of each claim and counterclaim as disclosed when the claim and counterclaim are filed. If the amount is between \$1-\$20,000, the fee is 3% (minimum \$200); \$20,000-\$40,000, the fee is \$600, plus 2% of excess over \$20,000; \$40,000-\$80,000, the fee is \$1000, plus 1% of excess over \$40,000. See AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES 17 (1984).

72. Broderick, *supra* note 36, at 65.

73. Morris, *Recent Developments in Alternative Forms of Dispute Resolution*, 100 F.R.D. 499, 520-21 (1983).

74. Based on the arbitration process typically used in the leasing industry, hearings are scheduled for a half day. Parties are not limited to that amount of time if the arbitrator finds it necessary to extend the hearing. Interview with Elizabeth Reichelt, Arbitration Coordinator for IFG Leasing Company, in Great Falls, Montana (Aug. 8, 1984).

75. Testa, *Slimming the Docket—A View From the Bench*, 58 FLA. B.J. 60 (1984).

which is appealing to litigants in a messy or embarrassing dispute. All that must be made public is the award that results from the arbitration hearing.<sup>76</sup> Generally there is no record of the hearing, and the arbitrator's decision is not published.<sup>77</sup>

When differences arise out of day-to-day commercial affairs, parties often prefer to settle them privately and informally.<sup>78</sup> Normally, the employment of arbitration more readily accommodates an ongoing business relationship. The dampening effect of virtual warfare that may develop during litigation is avoided; the end result is likely to be no different than at law.<sup>79</sup>

Public dissatisfaction with the formal adversarial process often makes arbitration an attractive option. Commentators argue that we have "overjudicialized" the system, with concomitant adverse effects on its efficiency as well as its accessibility to powerless litigants.<sup>80</sup> Accessibility to "justice" is no longer available to everyone; cost, time, and frustration with the end result restrict many from redress in court. The active individual participation characteristic of arbitration, however, tends to give parties a greater role in achieving justice.<sup>81</sup> Because parties select the arbitrator, they rarely criticize a decision rendered by her.<sup>82</sup> Furthermore, parties can set forth substantive legal rules in their contract, thus giving them control over the governing principles as well as the process.<sup>83</sup>

## VI. PROCESS

A decision to arbitrate is a decision to have the case heard and decided on its merits, rather than on procedural matters.<sup>84</sup> The parties agree to abandon the formal judicial process and all the procedural defenses relating to jurisdiction, notice, timeliness, adequacy of the pleadings, motions for summary judgment and the like.<sup>85</sup>

When a dispute arises under an agreement providing for arbitration, the complaining party initiates the arbitration process by

---

76. M. DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 29:06 (1984).

77. Knight, *Private Judging*, 56 CAL. ST. B.J. 108 (1981).

78. AAA, *supra* note 1, at 2.

79. Sander, *supra* note 66, at 120.

80. Rosenberg, *Devising Procedures That are Civil to Promote Justice That is Civilized*, 69 MICH. L. REV. 797 (1971).

81. Max, *Arbitration—The Alternative to Timely, Costly Litigation*, 42 ALA. LAW. 311 (1981).

82. MacLean, *supra* note 16, at 1306.

83. *Id.*

84. *Id.* at 1305, 1306.

85. *Id.* at 1306.

serving notice to the other party of its demand for arbitration. A demand for arbitration includes the names of the parties, the arbitration clause upon which it is based, the nature of the dispute, and the relief sought.<sup>86</sup> As in the commencement of a court action, service is crucial.<sup>87</sup>

Parties may file an answering statement to the demand, but it is not necessary to a party's case. Under the Commercial Arbitration Rules of the AAA, failure to answer will be considered a denial of the claim.<sup>88</sup> If the arbitration is conducted under the AAA rules, the party must file its answer within seven days after notice.<sup>89</sup> It is sometimes advantageous to answer so as to apprise the arbitrator of the respondent's position since otherwise the arbitrator will see only the claimant's presentation.

Counterclaims must also be asserted in a timely fashion. In the same manner as a demand, the counterclaim must contain a statement setting forth the nature of the counterclaim; the amount involved, if any; and the remedy sought.<sup>90</sup> While parties frequently submit counterclaims as an attempt to offset an award, AAA reports indicate that arbitrators grant offsets in only ten percent of the cases.<sup>91</sup>

The arbitration locale can be set forth in the contract, stipulated to by the parties, or designated by the arbitrator. In practice, mutually acceptable arrangements are made through consultations by the arbitrator with the parties or by the agency administering the arbitration. Notice of the hearing must be given by proper service since the confirmation of an award against a nonparticipating party will depend, among other factors, upon the proper service of the notice of hearing.<sup>92</sup>

---

86. *Del Bianco & Assoc. Inc. v. Adam*, 6 Ill. App. 3d 286, 285 N.E.2d 480 (1972). "The demand must state the specific nature of the existing controversy to be arbitrated." *Nager Elec. Co. v. Weisman Constr. Corp.*, 29 A.D.2d 939, 289 N.Y.S.2d 473 (1968); *P.J. Carlin Constr. Co. v. Rockland County ex rel. Rockland Community College*, 63 A.D.2d 702, 404 N.Y.S.2d 697 (1978).

87. Service by certified mail, return receipt requested, is the usual procedure, although the claimant may have to ask the sheriff to serve the demand. See AAA, *COMMERCIAL ARBITRATION RULES* § 40 at 13 (1984). Obviously, service by mail offers great convenience in terms of time and money. The use of the postal system to serve demands has judicial approval. In *Mulcahy v. Whitehill*, 48 F. Supp. 917 (D. Mass. 1943), an award rendered *ex parte* in New York in favor of an Argentine firm was enforced against the debtor in Boston. The district court deemed the agreement to arbitrate under AAA rules sufficient consent to service by mail within or without the state where the arbitration was held.

88. AAA, *COMMERCIAL ARBITRATION RULES* § 7 (1984).

89. *Id.*

90. *Id.*

91. DOMKE, *supra* note 76, at § 14:05.

92. *Seldner Corp. v. W.R. Grace & Co.*, 22 F. Supp. 338 (D. Md. 1938); *Hopkins v.*

The form of the arbitration proceedings depends essentially upon the agreement of the parties. Normally, the parties refer to the arbitration rules of an administering agency which will provide for the proper conduct of the proceedings.<sup>93</sup> In the absence of guidelines, the arbitrator must, at the very least, observe certain standards of fairness. Montana Code Annotated provides that the arbitrator must swear to "faithfully and fairly hear and examine the allegations and evidence."<sup>94</sup>

An oral hearing allows both parties to present their case before the arbitrator and to object to the arguments presented by the other side.<sup>95</sup> However, hearings may not be specifically required under the rules applicable to arbitration.<sup>96</sup> Both parties may waive oral hearings or the production of oral testimony, retaining the right to reply and comment on any document submitted to the arbitrator.<sup>97</sup> This is seldom done, however, since an oral discussion of issues is normally crucial.

The usual common law rules pertaining to the admission and rejection of evidence are not strictly applied in arbitration.<sup>98</sup> In a normal arbitration, very little evidence will be excluded. Arbitration is not intended to be conducted as formally as a judicial proceeding; thus, arbitrators have discretionary power to admit and hear any evidence that the parties may wish to present.<sup>99</sup> Technical objections are rarely heard. Good arbitrators, however, and especially ones who are attorneys, normally give less weight to evidence that would not be admissible in ordinary court procedures.

Arbitrators can question a witness themselves or request a party's attorney to produce additional evidence.<sup>100</sup> An arbitrator can also refuse to hear a witness named by the party. In *Hopkins*

School Dist. No. 40, 133 Mont. 530, 327 P.2d 395 (1958).

93. For example, the parties' arbitration clause may state: "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 Commercial Arbitration Rules of the American Arbitration Association."

94. MONT. CODE ANN. § 27-5-201 (1983).

95. See AAA, *supra* note 88, § 29. In the absence of special rules on the conduct of arbitration proceedings, such conduct is governed by the applicable provisions of general arbitration statutes. *Marsala v. Valve Corp. of Am.*, 157 Conn. 362, 254 A.2d 469 (1969).

96. *In re Thaler*, 135 N.Y.S.2d 532, 534 (1954).

97. For a practical summary of the usual procedure in an arbitration hearing, see R. COULSON, *BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW* 23-24 (2d ed. 1982).

98. M. HILL, *EVIDENCE IN ARBITRATION* 1 (1980).

99. *Frantz v. Inter-Insurance Exchange of Auto. Club of So. Cal.*, 229 Cal. App. 2d 269, 40 Cal. Rptr. 218 (1964); Coulson, *Appropriate Procedures for Receiving Proof in Commercial Arbitration*, 71 DICK. L. REV. 63, 73 (1966).

100. Hill, *supra* note 98, at 143.

*v. School District No. 40*,<sup>101</sup> the court held that such refusal did not amount to misconduct of the arbitrator when "there [was] no showing . . . that [the party] would have offered any evidence in addition to what the arbitrators actually received, or what was adduced before the arbitrators."<sup>102</sup> Often when an arbitrator is specifically chosen for her knowledge and expertise, her discretion in receiving evidence is significant. There is danger, however, that she may consider her own method to be the only correct one.

The arbitration statutes of forty-two states, the District of Columbia, and Puerto Rico give the arbitrator power to issue subpoenas to compel the appearance of witnesses and for the production of documents.<sup>103</sup> The USAA provides that the arbitrator may issue subpoenas if the evidence sought is material to the proceedings; this standard is generally accepted in state law.<sup>104</sup> In the practice of arbitration, however, arbitrators issue relatively few subpoenas.<sup>105</sup>

While under Montana law<sup>106</sup> arbitrators have the power to administer oaths to witnesses, witnesses generally do not have to be sworn.<sup>107</sup> Many times witnesses are sworn to show the witness the importance of her testimony. This may be even more important because of the informality of arbitration procedure which should otherwise prevail.

The UAA, USAA, and the state statutes all are silent on the use of law by arbitrators to determine the issues presented. Some arbitration clauses contain reference to either the law to be applied by the arbitrator or to the place of arbitration from which the parties' intention with respect to the law to be applied might be gleaned.<sup>108</sup> Freedom from a "strict" application of law is not, however, "disregarding the law." Arbitrators are carefully briefed by each opposing lawyer as to the applicable law. At the same time, attorneys argue the equitable and practical considerations that should be weighed by the arbitrator. An arbitrator does have the freedom of determining disputes according to her sense of justice, but arbitrators do not favor disregarding substantive law.<sup>109</sup>

101. 133 Mont. 530, 327 P.2d 395 (1958).

102. *Id.* at 535, 327 P.2d at 398.

103. UAA § 7 (1978). AAA, *supra* note 88, § 31. The Montana statutes do not provide the arbitrator with subpoena power.

104. USAA § 7; 9 U.S.C. § 7 (1982).

105. Domke, *supra* note 76, § 24:03.

106. MONT. CODE ANN. § 27-5-202 (1983).

107. Locklear v. Payne, 124 Ga. App. 845, 186 S.E.2d 439 (1971).

108. DOMKE, *supra* note 76, §§ 25:02-25:05.

109. Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 866-67 (1961).

It is often said that parties do not expect arbitrators to make their decision according to rules. Rather, especially when the arbitrators are not lawyers, parties expect decisions to be based on experience, knowledge of the customs of the trade, and fair and good sense.<sup>110</sup>

The award is the final decision of the arbitrator in the settlement of a controversy. Procedurally, the award must comply with certain formalities.<sup>111</sup> To qualify as a binding award, the findings of the arbitrator must result in a decision on the merits of the controversy.<sup>112</sup> An arbitrator's decision only has the effect of resolving the dispute submitted for arbitration. The conclusions of law and findings of fact reached by the arbitrator, while binding on the parties, have no effect as precedent in other similar disputes.<sup>113</sup> Thus, an appealing factor in some instances of arbitration is the resolution of the dispute without a binding interpretation of the law.<sup>114</sup>

Arbitration does not limit one's selection of remedies. Typically, the remedy available in court is limited by the pleadings or the pre-trial order. An injunction may be granted or denied. Damages may or may not be awarded. On the other hand, parties may enlist a whole host of alternatives following an arbitration.<sup>115</sup> Arbitrators under a broad contract provision can award either specific performance or damages based on the interest of justice.<sup>116</sup> Arbitrators frequently order specific performance because it is often the more equitable determination. The solution available is limited only by the parties' ingenuity. An imaginative lawyer can use an arbitration agreement to fashion flexible remedies that would be unavailable in court.<sup>117</sup>

An arbitration award is a decision and not a settlement in the sense of a compromise between the parties. An award must, on its face, dispose of all issues raised by either party by demand or

---

110. *S.A. Wenger & Co. v. Propper Silk Hosiery Mills*, 239 N.Y. 199, 203, 146 N.E. 203, 204 (1924).

111. *DOMKE*, *supra* note 76, §§ 29:01-29:06.

112. *Wilkins v. Allen*, 169 N.Y. 494, 62 N.E. 575 (1902).

113. *MacLean*, *supra* note 16, at 1306.

114. *Id.*

115. *Kreindler*, *supra* note 3, at 31-32.

116. *Id.*

117. At law, specific performance of a sales contract is the exception, not the rule. But do damages place the injured party in as good a position as the contract? The arbitrator's remedies can solve deadlocks in a closed corporation or partnership; arbitrators can direct dissolution of a corporation or direct the expulsion of a partner from the partnership. See *In re Berman*, 31 Misc. 2d 830, 222 N.Y.S.2d 716 (1961); *In re Steinberg*, 32 N.Y.2d 671, 295 N.E.2d 795, 343 N.Y.S.2d 133 (1973).

counterclaim.<sup>118</sup> The AAA's regular form of an award provides for a statement by the arbitrators that they have "duly heard the proofs and allegations of the parties."<sup>119</sup> The effect of such language is to indicate that the arbitrator has fulfilled her functions.

Once an arbitrator has determined an award, court enforcement of some type may need to be sought.<sup>120</sup> Through the use of statutory provisions, parties can confirm an award and convert it into a judgment. Under the UAA, an order confirming an award is authorized to be entered and enforced as any other judgment or decree.<sup>121</sup> This summary procedure eliminates the need to bring an action on the award. The time limit for a party to apply to the court for confirmation of an award ranges from one year to four years.<sup>122</sup>

Transforming an award into a judgment permits the use of the regular judicial enforcement process to satisfy the award. The USAA and the UAA both require that parties bringing any action upon the award do so in the jurisdiction where the award was rendered.<sup>123</sup> This is because a judgment cannot be entered upon an award which does not comply with statutory arbitration requirements.<sup>124</sup>

When the application for confirmation is made, the opposing party may set out grounds for vacating or modifying the award. Generally, however, a separate motion to vacate or modify the award is made within a shorter time period.<sup>125</sup> Judicial challenges of an award are made pursuant to statutes which provide special motions to vacate, modify, or resubmit the award to the same or new arbitrators.<sup>126</sup> These motion procedures are more expeditious than common law bases for such action.<sup>127</sup>

118. *In re Zephyr Constr. Co.*, 7 A.D.2d 915, 182 N.Y.S.2d 946 (1959).

119. *Meer Corp. v. Farmella Trading Corp.*, 14 Misc.2d 242, 244, 178 N.Y.S.2d 784, 786 (1958).

120. Of course, parties may acquiesce in the award and voluntarily comply. *Sandford Laundry, Inc. v. Simon*, 285 N.Y. 488, 35 N.E.2d 182 (1941).

121. UAA, *supra* note 13, § 14.

122. Under the USAA, the time limit for a party to apply to the court for confirmation of an award is one year after the making of the award. The UAA does not specify a time limit for confirmation of an award. Under California law, the time limit for confirmation is four years. CAL. CIV. PROC. CODE § 1288 (West 1982).

123. UAA, *supra* note 13, §§ 12, 13; 9 U.S.C. §§ 10, 11 (1982).

124. *DOMKE*, *supra* note 76, § 37:03.

125. Parties sometimes prefer to challenge the award within the statutory time limit (generally, three months) rather than wait until the other party attempts to have the award confirmed. *Lopez & Roque Tile Co., v. Clearwater Development Corp.*, 291 So.2d 126 (Fla. App. 1974).

126. *DOMKE*, *supra* note 76, § 33:00.

127. If nonstatutory enforcement of an award is permissible, it is done by bringing an



The statutory grounds for vacating an award are substantially the same as at common law. Most statutes set out the grounds by which a challenge of the award will be heard. Under both the UAA and the USAA, grounds for vacating an award are as follows:

1. the award was procured by corruption, fraud or undue means;
2. there was evident partiality or corruption in the arbitrators, or either of them;
3. the arbitrators were guilty of misconduct in refusing to postpone the hearing, or in refusing to hear evidence pertinent or material to the controversy, or any other misbehavior by which the rights of any party have been prejudiced; or
4. the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made.<sup>128</sup>

These statutes also allow for a modification or correction of the award where (a) there was an evident material miscalculation or mistake; (b) an award was made upon a matter not submitted; or (c) the award is imperfect in matter of form not affecting the merits of the controversy.<sup>129</sup> It is well-settled law under the decisions of federal and state courts that an award may be challenged only on the grounds which are specified in the statute.<sup>130</sup>

## VII. THE LAWYER'S PLACE IN ARBITRATION

Lawyers often mistakenly presume that arbitration is for non-lawyers.<sup>131</sup> But, it is lawyers who insert arbitration clauses into the contracts they draft and lawyers who appear regularly on behalf of their clients in these tribunals. The role of the lawyer in arbitration is critically important. Since the purpose of the arbitration hearing is to present all material evidence regarding the dispute, both sides should be represented by counsel.

The first function of the lawyer then is to insure that all of the facts relevant and favorable to the client's position are developed and that they are presented in the most coherent, and persuasive

---

action for judgment on the award. The time limit fixed by statute for motions to vacate, modify, or correct awards is usually 90 days. This brevity assures that any challenge will be made promptly.

128. 9 U.S.C. § 10(a)-(d) (1982); UAA § 12 (1978).

129. 9 U.S.C. § 11 (1982); UAA § 13 (1978).

130. *San Martine Compania de Navegacion v. Saguenay Terminals, Ltd.*, 293 F.2d 796 (9th Cir. 1961); *Hirt v. Hervey*, 118 Ariz. 543, 578 P.2d 624 (1978); *Moen v. State*, 13 Wash. App. 142, 533 P.2d 862 (1975).

131. *Craver, Don't Forget Your Problem Solving Function*, 69 A.B.A.J. 254, 254-55 (1983).

fashion possible.<sup>132</sup> Second, the lawyer must argue the client's position based on the facts and the law. These functions in fact require advocacy skills of the highest order. The task of arguing only the merits of the case to the arbitrator presents different challenges than arguing procedural technicalities, requiring the lawyer to focus more on substantive rather than procedural advocacy skills.<sup>133</sup>

Lawyers also play a crucial role as potential arbitrators. Since lawyers are comfortable with the hearing process and can likely receive, consider, and weigh evidence more fairly, they are better equipped to handle arbitration proceedings. Additionally, parties can select an attorney who has specialized knowledge in the field of the dispute.<sup>134</sup> The AAA maintains a panel of arbitrators who are qualified experts in their respective areas who remain available to the Association when called upon.<sup>135</sup>

### VIII. CONCLUSION

Arbitration is not an all-or-nothing proposal. No one is suggesting that litigation will or should disappear. But, arbitration has proven to be an efficient and equitable method of resolving claims.<sup>136</sup>

Montana law prevents willing parties from taking advantage of arbitration as an alternative to the judicial process. The need for this alternative is increasingly apparent. While *Southland Corp. v. Keating*<sup>137</sup> may sanction commercial arbitration in Montana, legislative action is necessary to allow arbitration of a variety of conflicts.

---

132. MacLean, *supra* note 16, at 1308.

133. ELKOURI, *supra* note 15, at 20.

134. Friedman, *Checklist for Commercial Arbitration*, 37 *ARB. J.* 10 (1982).

135. Max, *supra* note 81, at 325.

136. Testa, *supra* note 75, at 60.

137. 104 S. Ct. 852 (1984). However, strictly intrastate commerce would still be governed by MONT. CODE ANN. § 28-2-708 (1983).

