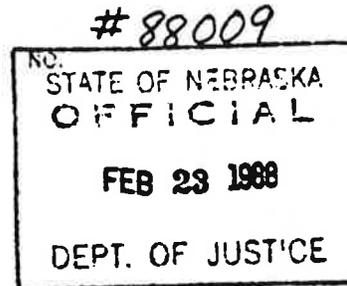


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: February 17, 1988

SUBJECT: Constitutionality of LB 951, Required Arbitration of Construction Liens

REQUESTED BY: Senator Brad Ashford,
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General;
Dale A. Comer, Assistant Attorney General

LB 951 would amend certain portions of §52-125 of the Nebraska Construction Lien Act, Neb.Rev.Stat. §§52-125 et seq. (Reissue 1984), to read as follows:

Any lien of less than \$10,000.00 recorded pursuant to §52-137 shall be subject to arbitration under the Uniform Arbitration Act if any interested party files a request for arbitration within thirty days of the recording of such lien. The recording of the lien shall be deemed to be consent to arbitration by the claimant.

You have inquired as to whether this provision requiring binding arbitration under the Uniform Arbitration Act is constitutional. We conclude that it is not, and our reasoning is set out below.

In our Opinion #87029, dated March 6, 1987, we considered the constitutionality of those portions of LB 661 and LB 71 dealing with arbitration. LB 71 was ultimately enacted into law and codified as the Uniform Arbitration Act, Neb.Rev.Stat. §§25-2601 et seq. (Supp. 1987). We began our analysis of the constitutionality of binding arbitration by noting that, in a series of cases beginning in 1889 and culminating in Overland Constructors v. Millard School District, 220 Neb. 220, 369 N.W.2d 69 (1985), our Supreme Court has consistently held that binding arbitration agreements entered into before a dispute arises are contrary to public policy and not enforceable. In Overland Constructors, the Supreme Court stated:

L. Jay Bartel
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While this Court is supportive of parties resolving their differences through arbitration, if possible, we have consistently held that an arbitration agreement entered into before a dispute arises, denying to the parties their right to seek the assistance of the courts, is contrary to public policy and is not enforceable. In a long line of cases . . . we have consistently held that a contract to compel parties to arbitrate future disputes and, thus, to oust the courts of jurisdiction to settle such disputes is against public policy and is void.

Id. at 224, 369 N.W.2d at 73. We also noted that the Nebraska rule against arbitration does not appear to be a blanket prohibition against all forms of that remedy, and we listed agreements to arbitrate existing disputes and agreements which would allow a full review of the arbitrator's decision on the merits by the district court as examples of acceptable arbitration. As a result, the propriety of arbitration in each instance appears to involve a twofold determination: first, does the agreement to arbitrate concern future disputes, and, second, to what extent is the arbitration agreement binding without recourse to the courts.

In our 1987 opinion, we then reviewed the provisions of LB 71 to determine to what extent an arbitrator's decision under that Act would be reviewed by a district court. We determined that a district court, under LB 71, could in no way consider the merits of the controversy, and that the district court would be limited, in great part, to questions concerning fraud or partiality. Because those standards were so narrow as to effectively deny parties to the arbitration the assistance of the courts, we determined that the general arbitration provisions of LB 71 were unconstitutional under the rule established in Overland Constructors and its companion cases. We did, however, point out that the arbitration provisions under LB 71 which provided for arbitration of existing controversies would be permissible.

The Uniform Arbitration Act contains the limited standard for district court review set out in LB 71. See, Neb.Rev.Stat. §25-2613 (Supp. 1987). Therefore, to the extent that the Uniform Arbitration Act would be applied to future controversies of any kind, it appears to us that the arbitration procedures under the Act would be unconstitutional and unenforceable.

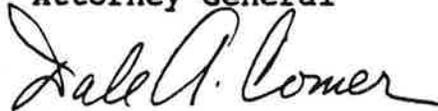
LB 951, the subject of your concern, provides that construction liens under \$10,000 shall be subject to arbitration under the provisions of the Uniform Arbitration Act if any interested party files a request for arbitration within 30 days of the recording of such lien. It seems to us that this proposed statute would require the arbitration of future controversies as

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provided in the Uniform Arbitration Act. Given the narrow and restricted judicial review of an arbitrator's determination under the provisions of the Act, it is our view that LB 951 would require an unconstitutional and unenforceable form of arbitration.

Sincerely,

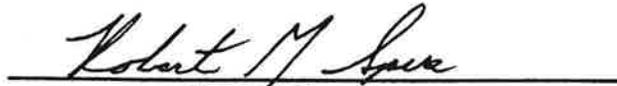
ROBERT M. SPIRE
Attorney General



Dale A. Comer
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY: _____



Attorney General