Enforcing Consumers' and Employees' Legal Rights

The Truth About Arbitration

By Keith Maurer

THE AMERICAN BAR ASSOCIATION reports that 100 million Americans are effectively barred from seeking justice by the high cost of lawyers and the lawsuit system.[1] The *ABA Journal* reported that most lawyers wouldn't even take a case that is worth less than $20,000.[2] The complaints of most consumers don't begin to approach that level. Arbitration gives plaintiffs who might otherwise be precluded from receiving any remedy an opportunity to pursue relief and have their claims heard by an impartial decision maker.

Justice is enhanced in properly conducted arbitration proceedings, which provide a practical forum for resolution of disputes. Arbitration is quicker, less expensive, and more informal than litigation. Arbitrations conducted under rules that require arbitrators to follow the law, such as the National Arbitration Forum *Code of Procedure,* provide a means of securing all substantive legal remedies.

Congress enacted the Federal Arbitration Act in 1925 to reverse the longstanding judicial hostility to arbitration agreements by American courts, placing arbitration agreements on the same footing as other contracts. The act sets forth a national policy favoring arbitration, which finds its core expression in Section 2, providing that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[3] Federal courts, including the United States Supreme Court, have consistently upheld this national policy.

The federal policy favoring arbitration encouraged the broad use of arbitration. Pre-dispute arbitration clauses are now included in hundreds of thousands of contracts of all kinds.

The arbitration systems of the major providers, including the American Arbitration Association, JAMS, and the National Arbitration Forum, involve procedures far less complex than those of the lawsuit system. In its wide-ranging support of arbitration, the United States Supreme Court touted the following advantages of arbitration:

> *"The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices."*[4]

Consumer advocates agree. *Consumer Reports* magazine observes, "Arbitration can help consumers settle their disputes faster and cheaper than by litigation. It commonly takes anywhere from two to five years to get a civil case before a judge; an arbitration case can often be resolved within a matter of weeks."[5]

Is it any wonder that, understanding the alternatives, parties are contracting for arbitration at an ever-growing rate?

Despite the growing use and acceptance of arbitration, there still exists some misunderstandings and misconceptions about arbitration. In fact, some individuals and groups spread myths about arbitration because a more complicated, more expensive, and riskier system is to their advantage. These recurrent inaccuracies warrant correction.

Myth Number One: Arbitration is too expensive. Wrong. Arbitrating a dispute is far less expensive than litigating a dispute to resolution. Arbitration filing fees, hearings fees, and elective attorney fees are much less than the total of litigation costs and expenses and mandatory attorney fees.[6] Further, businesses and employers voluntarily pay, or may have to pay, for all or part of the costs of consumer and employee arbitration.[7]

Myth Number Two: Litigation is the traditional, time-honored way to resolve problems. Inaccurate. Arbitration dates back to the Old Testament in the Bible, predating American lawsuits by several thousand years.[8] Arbitration and judicial systems akin to arbitration are used much more frequently than lawsuits in many countries. Mediation, as well as arbitration, is either suggested or mandated by many judges before a case will be heard in court.[9]

Myth Number Three: Americans have an absolute right to have their civil disputes resolved by a jury. Incorrect. If they choose to go to court, Americans may demand their constitutional right to a jury trial, but also have a right to contract for another way to seek relief.[10] In reality, very few parties can afford to try a case before a jury. Realistically, for most Americans, arbitration is the only opportunity to vindicate their rights.

Myth Number Four: Arbitration denies parties their substantive rights and remedies. Wrong. Parties are entitled to the same substantive rights and same remedies as in court. A party can assert common law, statutory, contractual, and other types of claims in arbitration.[11] An arbitrator has the same power as a judge to award monetary damages, injunctive relief, and other legal and equitable remedies. Arbitration provides a different forum, but does not restrict the rights or remedies available to a party.

Myth Number Five: Arbitration denies parties due process and other legal rights. Wrong again. Arbitration organizations and arbitrators follow due process standards that apply to judicial proceedings.[12] Parties have the same opportunity to present a case before an arbitrator as they do before a judge, and courts have the opportunity to review arbitration proceedings before and after the arbitration process to make sure due process standards were followed. The Supreme Court has held that parties are entitled to all of their substantive rights in arbitration.

Fast Facts:

Justice is enhanced in properly conducted arbitration proceedings.

Pre-dispute arbitration clauses are now included in hundreds of thousands of contracts of all kinds.

Arbitration is quicker, less expensive, and more informal than litigation.

Myth Number Six: Arbitration does not allow parties to seek discovery from each other. Incorrect. Arbitration rules and procedures either specifically authorize discovery requests or allow arbitrators to order discovery at their discretion.[13] The same useful discovery methods available in litigation, including document production and depositions, may be available in arbitration proceedings. Discovery in arbitration may be properly limited to affordable disclosures of relevant and reliable information.

Myth Number Seven: Arbitrators do not have to follow the law. Wrong. Arbitration rules require arbitrators to follow the law, holding them to the same standards as a judge.[14] Arbitration clauses may also contain this requirement. Also, courts can review awards to make certain that the arbitrator correctly applied the law.

Myth Number Eight: Arbitration is only for large claims. Inaccurate. Arbitration procedures exist for small claims and for claims of all sizes and types, from less than $1,000 to over $1,000,000. Arbitration filing fees begin at $25 for a small claim.[15] Mediation can also be used to resolve all kinds of disputes.

Myth Number Nine: Arbitration denies parties relief available only in class actions.

Wrong. Class action lawsuits have been necessary in America because individual parties cannot afford to use a lawsuit to seek relief. Class actions may also be available in arbitrations.[16] The American class action rule was adopted as a procedural rule because litigation made it too expensive and complicated for individuals to bring small claims. Arbitration readily permits consumers, employees, and other individuals with complaints against businesses to recover everything they may have lost, including the cost of arbitration. With this available relief, courts have generally held that class actions are unnecessary.

Further, when nece'ssary, public agencies can pursue class actions and obtain public relief for a class of individuals. Government lawyers can retain private lawyers and work together with them on behalf of the public. Class action rules were implemented at a time when there were few cases being brought by public lawyers on behalf of the public and individuals. Now it is much more common for the government to sue on behalf of a class of individuals. Private arbitration and public class action cases can provide comprehensive and effective enforcement of the laws.

Myth Number Ten: Arbitration proceedings are conducted in secret. Inaccurate. Arbitration rules and proceedings are public and readily available.[17] Arbitration awards are published at the request of any party or as required by law. Arbitration organizations may publish arbitration awards.[18] Awards are also reported when they are confirmed as civil judgments. Judges review arbitration proceedings, hearings, and awards in open court.

Myth Number Eleven: Arbitration awards cannot be appealed. Inaccurate. The court of the state or country where the arbitration award is sought to be enforced can review the award to determine if it is legal and enforceable.[19] The court can review de novo whether the arbitrator who was compelled to follow the law, did so. The Federal Arbitration Act and state arbitration acts permit judges to review an arbitration award.[20]

Myth Number Twelve: Lawsuit decisions are more enforceable than arbitration awards. False. An arbitration award must be enforced in a judicial forum, unless there is a reason for the court to vacate the award.[21] Federal and state arbitration acts require American courts to recognize and enforce awards entered in different states. Treaties require foreign courts to enforce arbitration awards entered in different countries. It is often easier to enforce an arbitration award in a foreign country than it is to enforce a civil judgment.

Mistrust of arbitration procedures rests on an archaic understanding of the arbitration process. Arbitration processes are subject to intense oversight by the courts and the courts review arbitrator decisions made under the law. Arbitration delivers access to justice for millions of Americans who could never get into the lawsuit system. ✦

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Footnotes

1. Quin Tian, *Public Loses As Lawyers Block Access to Cheaper Legal Help,* USA Today (Feb. 19, 1999).
2. Jill Schachner Chanen, *Pumping Up Small Claims,* ABA Journal, p 18 (Dec. 1998).
3. 9 USC 2.
4. *Allied-Bruce Terminix Co, Inc v Dobson,* 513 US 265, 280 (1995) (quoting HR Rep. No. 97-542, p 13 (1982)).
5. *Consumer Reports,* August 1999, p 64.
6. E.g., National Arbitration Forum (NAF) Appendix C *available at* http://www.arbitration-forum.com.
7. *Cole v Burns Int'l Sec Servs,* 105 F3d 1465, 1483–85 (DC Cir 1997).
8. "If only there were someone to arbitrate between us, to lay his hand upon us both, someone to remove god's rod from me, so that his terror would frighten me no more." *Job* 9:33 (NIV Version).
9. E.g., Cons. Minn. Gen. R. of Prac. 114; 42; PA Cons. Stat. Ann. §§ 1301–1314; 28 USC 471; Wayne Brazil, *A Close Look at Three Court Sponsored ADR Programs,* 1990 U. Chi. Legal F. 303, 303.
10. *Johnson v W Suburban Bank,* 225 F3d 266 (CA 3, 2000); *Stout v JD Byrider,* No. 99-3854, 2000 WL 1269402 (CA 6, Sept. 8, 2000).
11. *Gilmer v Interstate/Johnson Lane Corp,* 500 US 20, 26 (1991).
12. National Arbitration Forum, *Arbitration Bill of Rights at* http:/www.arbitration-forum.com; *Armendariz v Found Health Psychcare Srvcs Inc,* 99 Cal Rptr 2d 745, 745 (Cal 2000).
13. National Arbitration Forum Rule 29—Discovery; David F. Herr & Roger S. Haydock, Discovery Practice at § 10.3 (Aspen, 3d ed. 2000); Roger S. Haydock, et al., Fundamentals of Pretrial Litigation, § 5.1.2, § 5.3.1 (Aspen, 4th ed. 2000).
14. National Arbitration Forum Rule 1—Arbitration Agreement; Edward Brunet, *Replacing Folklore Arbitration with a contract Model of Arbitration,* 74 Tul. L. Rev. 39, 57 (1999).
15. National Arbitration Forum Appendix C, *available at* http://www.arb-forum.com.
16. *Johnson v W Suburban Bank,* 225 F3d 266 (CA 3, 2000); *Stout v Byrider,* No. 99-3854, 2000 WL 1269402 at *7 (CA 6, Sept. 8, 2000); Bette J. Roth, et al., *The Alternative Dispute Resolution Guide,* §§ 15.1–15.13 (West Group 1999).
17. National Arbitration Forum *at* http://www.arbitration-forum.com; Judicial Arbitration Mediation Services *at* http://www.jamsadr.com.
18. National Arbitration Forum ICANN *at* http://www.arbitration.forum.com/domains/.
19. 9 USCA 9 (2000); *Blanchard and Co v Heritage Capital Corp,* No. 3:97-CV-0690-H, 2000 WL 1281205 at *3–4 (ND Tex Sept. 11, 2000).
20. Roth, fall citl. 49, § 14.1–14.17, 19.1–19.27.
21. Grenig, fall citl. 38, §§ 20.10–20.49.

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