# ARBITRATION ENFORCED AT ANY COST? PERHAPS NOT.

**by Robert M. Heller**

The pendulum may finally be swinging back. Recent court opinions, as discussed below, reveal a more guarded approach toward the once heralded arbitration process, as evidenced by judges' greater willingness to vacate arbitration awards and carve out exceptions to contractual arbitration.

As arbitration gained popularity in the 1980's and 1990's, it was readily welcomed by many as a superior alternative to the courthouse - cheaper, faster and more flexible. Courts favored arbitration to reduce busy calendars, and avoided oversight or inquiry into the arbitration process. That left it to arbitrators to determine the rules, the evidence admitted and the ultimate result. This "hands-off" approach led courts and legislatures to say that arbitration is "favored." But the question is, should it be?

Arbitration has not lived up to its billing. Many industries forced employees and consumers to arbitrate, casting a pall over the assumption that arbitration was "voluntary." Many industries also began requiring use of the same arbitration panels throwing doubt into the assumption that arbitrators are "independent." Moreover, the fact that arbitrators were given a singular power to decide practically every aspect of a dispute, yet were insulated from review, generated a perception that arbitration could and, in some instances, did generate unfair and abusive results. And with arbitrators charging high hourly rates, some wondered if arbitrators had sufficient incentive to insure a faster or cheaper resolution.

Recently, the pendulum appears to be swinging in the other direction:

- Courts have increasingly refused to enforce arbitration provisions on the grounds they are unconscionable or induced by duress or fraud.

- Courts are increasingly less likely to order non-signatories to arbitrate.

- Courts are more willing to find a party has waived the right to arbitrate.

- Courts have become increasingly open to vacating arbitration awards. A recent California court vacated an arbitration award because an arbitrator improperly excluded evidence that substantially prejudiced a party, reasoning this denied the party the benefit of its bargain to arbitrate at all.

- Courts have also been willing to carve out an exception to the otherwise stringent California statute which prohibits challenging arbitration awards on the ground of errors of law, no matter how severe, by refusing to grant finality to an award that would be inconsistent with a party's statutory rights.

These cases appear to signify a reversal of the “hands-off” approach and, a recognition that arbitrators can make serious errors that should not be enforced.

Congress too is getting involved. In April, the Arbitration Fairness Act of 2009 was introduced in the Senate. This proposal, if passed, would make agreements requiring arbitration for employment, consumer, franchise and civil rights disputes unenforceable. The bill does not prohibit arbitration, but rather prevents a party with greater bargaining power from forcing individuals to arbitrate through a contractual provision that was not truly voluntary.

While arbitration has its advantages, recent developments suggest that courts and lawmakers are becoming more concerned with fairness, rather than simply arbitration enforcement which can lead to inequitable results.