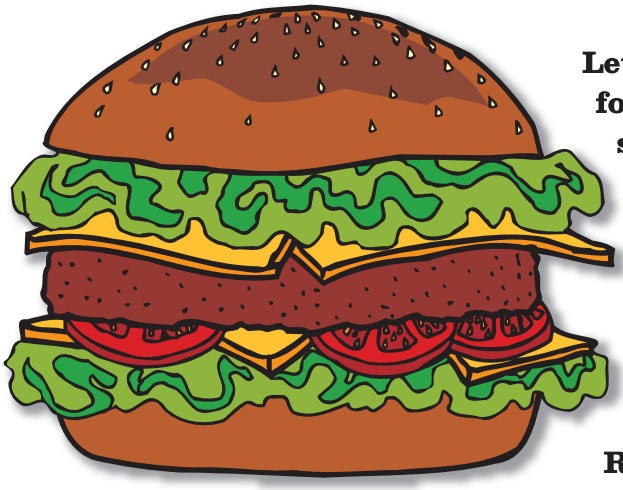
Death by Arbitration

By Claude E. Ducloux*



Let's say you buy a cheeseburger for 3 dollars. It's tastes bad, so you bring it back to the cook and say, "replace this cheeseburger." What if the cook said, "Sure, just pay me 9 more dollars, and I'll let you know what I'm going to do about your cheeseburger." Ridiculous? Read on, justice-seekers.

As a lawyer with a broad litigation practice whose clients are primarily reaching into their own pockets to pay me, I've always been extremely concerned with the price of legal services. When arbitration became the "golden child" alternative to litigation, I jumped on that bandwagon along with everybody else. My experiences, however, in arbitration, combined with now increased access to the real courtroom resulting from the palpable decline in litigation, have caused me to reassess that position. As you know from my previous columns, I've been very concerned that the touted benefits of arbitration (speed and finality) are now all too often outweighed by the expense, uncertainty, and all too frequent prejudice of the arbitrators towards their "customer base": those who get sued a lot (also known as repeat customers). Frankly, no arbitrator who appropriately whacks a bad guy with statutory penalties and fees can realistically expect to get repeat business from that party. And the outcomes prove it.

Therefore, while I have hopped off that speeding train, the judiciary has all too often ordered "Full Speed Ahead!" We're seeing opinions that endorse arbitration at every turn, which, in my mind, is an evolving mystery. Frankly, considering the size of disputes that most of my typical business clients have, give me a good ole' county court- at-law judge or district judge anytime. I truly believe our judges try to do their best work, and try to get the answer right without worrying about politics or "repeat business." The resolution of small cases at the courthouse is speedy and, unless your firm is training a new associate, reasonably inexpensive.

Indeed, two of the three of the litigation-based CLE programs at which I have spoken on other issues over the Summer of 2005 have each featured speakers

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warning the attendees of the dangers of arbitration clauses and the appellate bench's apparent addiction to their validity. Unfortunately, in our polemic society, intelligent discussion all too often gives way to invective, so any criticism is termed anecdotal, and those who challenge the wisdom of arbitration are termed "poopieheads."

Now, just when I need it, here comes a perfect case to illustrate my point. So let me throw a log on that fire: the recent case of Olshan Foundation Repair v. Ayala (2005 Tx. App. LEXIS 7350, 04-0400829CV) out of San Antonio. Get a load of this.

The Ayalas hired Olshan for foundation stabilization for a total job price of $22,650.00. As with many of these companies, they have learned not only to install foundation parts, but arbitration clauses as well. When the foundation allegedly failed, the Ayalas sued, and Olshan invoked the arbitration clause. The Ayalas and Olshan received the standard letter saying that (1) AAA will preside over the arbitration; (2) a panel of three structural engineers approved by AAA will conduct the arbitration; and (3) the arbitration will cost the parties over $63,670.00,(!) and the Ayalas were invoiced by AAA for their "share" of $33,150.00 "payment due upon receipt" (Wouldn't you like to have been a fly on the wall when they opened that bill!). The Ayalas sued to void the clause, arguing that the arbitration cost was so prohibitive as to render the arbitration agreement unconscionable.

The trial court ruled for the Ayalas, and, in a split decision, the San Antonio Court affirmed that finding, admitting that a $64,000.00 fee to arbitrate a $22,500.00 dispute is "by any definition, shocking." As the Court's majority opinion reports, the evidence concerning costs and expenses was *uncontroverted*. Nevertheless, the dissent argued that "unconscionability" had to be determined at the outset of the contract, and since nobody knew that AAA would charge that much (duh. How could they disclose that fee? No one would ever hire Olshan!), the dissent would have told them, "tough noogies, the courts favor arbitration," and thus, would have forced the Ayalas to pay the arbitrator to resolve that case (despite their evidence that their "share" of the fee constituted a substantial percentage of the Ayalas' annual income).

Read it yourself. Many of you might represent interests who are "repeat customers" and therefore love arbitration. In my mind, unless it's a very small matter using an arbitrator you can trust, and you need instant and final resolution; arbitration is proving to be a crap shoot of ever-increasing uncertainty. Unlike a mediator, whose worst result is simply failing to get a case settled, validate your parking, or poison you with bad cookies), a bad arbitrator, who's only qualification often is that he or she passed a training course, can really ruin people financially. Is this the justice the founding fathers sought to promote?

Where are you on this? As the Legislature continues to pound nails into courthouse doors with cumbersome, ineffective and discouraging administrative remedies, thus closing down judicial avenues to recovery for consumers, small businesses and homeowners, we lawyers must play a significant role in protecting the public and pushing the debate. If you think I'm wrong on this, please let me hear from you. If you think I'm right, make sure your clients understand (as I ensure mine do) that arbitration is not a panacea, but just one other remedy with treacherous costs, unreviewable results, lacking any requirement that resolution follow legal precedent.

If that's wrong, sue me. I promise you won't have to arbitrate.

Keep the faith.

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