

Avoid the Pitfalls

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Carefully designed scheduling orders, strict limits on discovery, and the use of dispositive motions are a few devices that may allow arbitration to continue to be an effective tool.

# Methods for Cost-Efficient Resolution in Arbitrations

Arbitration emerged as a mainstream form of dispute resolution because many litigants were fed up with the cost of and time involved in traditional litigation. Parties viewed arbitration as an efficient, cost-effective alternative to liti-

gation, and they flocked to it as if were a cure-all elixir. Arbitrating parties, however—undoubtedly accustomed to the ways of traditional litigation—brought with them much of litigation’s baggage. This baggage, including extended discovery and motion practice, long hearings, and frequent appeals, left arbitration bloated and slowly transformed its cost-efficiency and speed to an expensive, slow, and frustrating process.

Now, many parties and attorneys alike are retreating from arbitration. These parties are either reverting back to litigation or searching for other forms of dispute resolution. Mary Swanton, *System Slow-down: Can Arbitration Be Fixed?* INSIDE COUNSEL, May 1, 2007. In fact, many parties—especially companies—are removing mandatory arbitration language from business and employment contracts. *Id.* They are jumping ship, mainly because they view arbitration as highly costly and time-consuming.

We need to realize that arbitration, in and of itself, is not the source of the problems currently associated with it. Rather, the problems associated with arbitration—namely high costs—emanate from how litigants’ have treated arbitration. Because litigants have treated arbitration as they have treated litigation, arbitration processes have taken on characteristics of litigation.

In the current economy, cost-effective methods of resolving disputes are at the forefront of client concerns. Simply put, now, more than ever, clients are looking for ways to cut costs. This article briefly discusses the primary reasons for the rising cost of arbitration and describes several cost-saving techniques that parties can use to avoid the pitfalls that have made arbitration so expensive while still maintaining its inherently attractive qualities, such as flexibility, confidentiality, and decision-making expertise.



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## The Reasons for Rising Arbitration Costs

Understanding the reasons why arbitration costs have risen requires explaining the items that make up its costs. Arbitration costs consist of three primary items: (1) administrative costs; (2) arbitrators' fees, which vary, depending on an arbitrator's rate and how much time the arbitrator spends officiating a controversy; and (3) litigation costs, which include attorneys' fees. Christopher Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 816 (2007–2008). Discovery, motion practice, and appeals in arbitration have become increasingly similar to those practices in ordinary litigation. Because of this, costs associated with arbitrators' overall fees and litigation expenses have risen, increasing costs for all parties and reducing or eliminating arbitration-related traditional savings.

The fees that parties must pay to have their dispute heard by an arbitration association make up administrative costs. Similar to a filing fee in state or federal court, parties to arbitration must pay to have a claim heard by an arbitration organization. Administrative costs are typically based on a sliding scale, which depends on the amount in controversy. Currently, administrative fees for commercial arbitrations range from \$975 for claims that are less than \$10,000 to a fee of \$18,600 for claims that are greater than \$10,000,000. *See* Am. Arb. Ass'n Commercial Arb. Rules and Mediation Procedures, amend. Jan. 1, 2010.

Little evidence suggests that administrative fees have risen in recent years. Commercial arbitration administrative fees levied by the American Arbitration Association have not increased since September 1, 2007. *Am. Arb. Ass'n Commercial Arb. Rules and Mediation Procedures*, amend. Sept. 1, 2007. In fact, many arbitration organizations, including the American Arbitration Association, have instituted procedures that decrease administrative fees if parties settle before proceeding to the final evidentiary hearing. *Am. Arb. Ass'n Commercial Arb. Rules and Mediation Procedures*, amend. Jan. 1, 2010.

The second arbitration cost item is the arbitrator's fee. Unlike courts, arbitrators charge fees, usually hourly or daily, to hear

and rule on parties' disputes. In 2001, the American Arbitration Association conducted a series of surveys of its member commercial arbitrators. Christopher Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 820 (2007–2008). The survey revealed that those commercial arbitrators' fees ranged from \$600 per day to \$5,000 per day. *Id.* The mean fee per day was slightly less than \$1,500, while the median was slightly more than \$1,500. *Id.* No evidence exists that arbitrators' hourly or daily fees have increased in recent years. The overall costs associated with arbitrators' fees, however, have drastically risen due to increased discovery and longer hearings.

Litigation expenses are the primary reason why arbitration expenses have risen in recent years. Initially, parties to arbitration often have expenses associated with enforcing an arbitration clause in court before a controversy can proceed to arbitration. Jonathan Wilson, former general counsel for Interland, Inc., has stated that his company invested "more than a year's worth of time and substantial legal fees simply to enforce in court our right not to have to go to court." Lou Whitman, *Arbitration's Fall From Grace*, Law.com, July 13, 2006, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005457792>. In fact, from 2005 through 2007, courts across the country published more than 500 opinions regarding the enforceability of mandatory arbitration clauses. *See* Joseph Daly & Suzanne Scheller, *Strengthening Arbitration By Facing Its Challenges*, 28 QLR 67 (2009). Courts overwhelmingly enforce mandatory arbitration clauses. *See Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281 (6th Cir. 1990) (upholding a decision granting the defendants' motion to compel arbitration and holding that courts are to examine the arbitration language in a contract in light of the strong federal policy in favor of arbitration); *Kruse v. AFLAC*, 458 F. Supp. 2d 375 (E.D. Ky. 2006) (granting the defendant's motion to compel arbitration pursuant to a binding arbitration clause in an underlying contract and finding that "[i]t is well-settled that the courts should enforce private agreements to resolve disputes by mandatory binding arbitration and any ambiguities or doubts should be resolved in favor of arbitration"). The problem, however, is that parties have to

expend time and money litigating the right to have a controversy arbitrated before proceeding to arbitration.

Litigation expenses have also increased because the arbitration process has become more analogous to the process involved in a lawsuit. To a great extent, parties today operating under standard arbitration rules engage in extended discovery and motion

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practice. Thomas Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 6 (2010). Moreover, hearings have become much longer because parties and arbitrators take pains to avoid subsequent vacatur due to perceived procedural injustices. *Id.* Traditional courtroom practices have increased time and cost in a dramatic fashion. *Id.*

## Methods to Lessen Arbitration Costs

The rise in arbitration costs combined with the current economy have clients scrambling to find ways to save money. Enlisting some or all of the following techniques may help economize, as well as save time, while retaining the qualities anticipated of arbitration. Before arbitration, parties should consider voluntary or involuntary mediation. On commencing arbitration, parties should consider engaging in a scheduling conference and submitting to an ensuing scheduling order. Finally, during arbitration, parties should consider limiting discovery, ensuring the ability to file dispositive motions, restricting the total hearing time, and prospectively agreeing to limit the appealability of an arbitration award.

## Mediate with an Independent Mediator

Parties can reduce arbitration costs by engaging in mediation before an arbitration hearing. Settling before an arbitration hearing will save the parties the fees and ex-

penses associated with the hearing, which can be substantial. Mediation often leads to settlement because it requires the parties to think about the additional costs and risks associated with continuing and offers them a forum in which to present their cases. Don Peters, *Just Say No: Minimizing Limited Authority Negotiating In Court-Mandated Mediation*, 8 PEPP. DISP. RESOL. L.J. 273, 275

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(2008). Mediation can also narrow the scope of issues requiring arbitration.

Mediation before arbitration can have voluntary or involuntary origins. See Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1253–1255 (2009). Parties can voluntarily engage in mediation at any time. Indeed, voluntary mediation is encouraged, since it can lead to the cost savings discussed above. In fact, many in-house counsel prefer mediation over arbitration. Leslie A. Gordon, *Clause for Alarm*, 92 ABA J. 19, 19 (2006). Issues can arise, however, when parties do not wish to engage in mediation. Depending on the specific factual situation, involuntary mediation may be appropriate.

Mediation before arbitration can originate in one of two ways. First, a contract that requires parties to arbitrate can also require the parties to mediate before they arbitrate. An attorney drafting a contract wishing to reduce expenses should seriously consider requiring mediation before arbitration. Second, an arbitrator can order parties to mediate, similar to the way that many state and federal court judges require mediation before beginning trials. See Will Pryor, *Alternative Dispute Resolution*, 61 SMU L. REV. 519, 524 (2008). Before ordering parties to mediate, however, an arbitrator should consider the specific circumstances of a case. If one or both parties have expressed complete unwillingness to settle, mediation may waste every-

one's time and money. On the other hand, if both parties are willing to mediate, the parties are more likely to settle the case.

Regardless of how a case ultimately ends up in mediation, a mediator and an arbitrator assigned to a case must each operate completely independently. The mediating parties need to feel that they can communicate candidly with a mediator for mediation to succeed. Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URBAN L.J. 935, 952 (2001). If a party knows that a mediator will later judge a case on the merits, that party may be less truthful with the mediator than if the mediator purely and independently mediates. *Id.* Moreover, when an arbitrator also serves as a mediator, it raises an ethical conflict, which may disqualify that person from the case, also opening an arbitration award to a challenge. See Robert H. Smit, *Effective Advocacy, Efficient Proceedings and Ethics in International Arbitration*, 704 PLI/Lit 471, 508 (2004).

In sum, engaging in mediation can decrease the cost of arbitrating by resolving contested claims early or narrowing the issues argued during the arbitration hearing. Mediation, however, is not appropriate in all cases, and parties and arbitrators should consider the specific circumstances of cases before deciding to mediate.

### Impose a Mandatory Scheduling Conference and Scheduling Order

Parties to arbitration should consider submitting to a scheduling conference and scheduling order. Similar to scheduling conferences in state or federal court, arbitrators use scheduling conferences to establish discovery limits and deadlines, limits on motion practice, and hearing dates and lengths. Frequently, in complex proceedings, or those involving a large amount in controversy, the governing rules mandate that parties must submit to some kind of scheduling conference. See Am. Arb. Ass'n Commercial Arb. Rules, Procedures for Large, Complex Commercial Disputes, L-3, June 1, 2009. Even if optional, parties should still consider submitting to a scheduling conference because the ensuing orders will bring certainty.

Scheduling conferences offer many inherent benefits. First, scheduling conferences can offer arbitrating parties strategic advantages. Scheduling conferences allow parties to evaluate the opposition's ability or willingness to mediate some or all of its claims. Scheduling conferences also provide a chance for parties to determine the issues of key importance to the other side. With this information, parties can better gauge the costs, risks, and time of arbitrating. Additionally, parties have a chance in a scheduling conference to argue for cost-saving tactics, such as limited discovery, motion practice, and evidentiary hearings.

Scheduling orders also offer many benefits. Scheduling orders impose a reliable plan on the parties, assists counsel in preparing reasonable, accurate estimates on discovery, motion practice, evidentiary hearings, and appeals-related costs. With a scheduling order, counsel can more accurately provide clients with information on the costs of a case than otherwise.

### Place Limits on Discovery

In recent years, the cost of arbitration has increased partly due to increased prehearing discovery. See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 12 (2010). Unfortunately, attorneys, clients, and arbitrators favor and often foster extensive discovery. *Id.* at 13. As in traditional, court-based litigation, attorneys and clients promote extensive discovery in arbitration because they hope that it will help their cases. *Id.* Arbitrators compound the behavior. Many arbitrators do not limit discovery because they fear it could lead to reversal, or they desire to placate the parties in the hope of obtaining future appointments. *Id.*

Despite general unwillingness to limit discovery, given discovery's high cost, establishing limits is an excellent way to save costs for all parties. Indeed, according to a 1999 federal court newsletter, document discovery accounts for 50 percent of litigation costs in the average case. Administrative Office of the United States Courts, The Third Branch, Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls (Oct. 1999). In cases in which discovery is "actively used," associated costs can account for up to 90 percent of total litigation costs. *Id.* Of

course, entirely eliminating discovery is impossible. However, the arbitrating parties must agree on a standard for discovery, and fortunately, parties can choose from a number of standards, though each standard confers a great deal of discretion to an arbitrator.

The American Arbitration Association Commercial Arbitration Rules provide that an arbitrator, “consistent with the expedited nature of arbitration,” may order the production of documents and other information. Am. Arb. Ass’n Commercial Arb. R. 21(a). Notably, “[t]he arbitrator is authorized to resolve any disputes concerning the exchange of information.” Am. Arb. Ass’n Commercial Arb. R. 21(c). The American Arbitration Association Procedures for Large, Complex Commercial Disputes provide that “[t]he parties may conduct such discovery as may be agreed to by all the parties provided, [but] the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate.” Am. Arb. Ass’n Procedures for Large, Complex Commercial Disputes R. L-4(c).

Other arbitration standards provide similar discovery procedures. For example, the Revised Uniform Arbitration Act provides that “[a]n arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.” Revised Uniform Arbitration Act §17(c). Rules promulgated by JAMS, a nationwide arbitration organization, allow parties to take one deposition and require parties to produce documents and witnesses that support their claims and defenses. JAMS Comprehensive Arbitration Rules §17(a)–(b). The arbitrator has the authority to settle any discovery disputes that may arise. JAMS Comprehensive Arbitration Rules §17(d).

Clearly, parties and arbitrators have broad discretion in determining the appropriate amount of discovery. Therefore, the key to limiting discovery, thereby reducing costs, in a commercial arbitration is twofold. First, parties should agree to the scope of discoverable materials before beginning arbitration. Of course, each

case differs, and it is impossible to fashion a hard-and-fast rule regarding discoverability. JAMS, however, has created a list of relevant factors for arbitrators to consider in determining the scope of discovery. See JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases. Arbitrating parties can use this list, which includes factors such as the nature of the dispute, the relevance and reasonable need for the requested discovery, and the characteristics and needs of the parties, to jointly define the scope of discovery. See *id.* Second, the parties should choose an arbitrator who is inclined to limit discovery. Simply put, an arbitrator who is willing to limit discovery can save time and money for arbitrating parties while maintaining fair proceedings. Notably, an arbitrator should not fear limiting discovery because an arbitrator’s decision to limit discovery is overwhelmingly upheld on appeal. See *Rintin Corp., S.A. v. Domar, Ltd.*, 374 F. Supp. 2d 1165 (S.D. Fla. 2005); *Lummus Global Amazonas S.A. v. Aguaytia Energy del Peru S.R. Ltda.*, 256 F. Supp. 2d 594 (S.D. Tex. 2002).

To repeat, extensive discovery can greatly increase the total cost of arbitration. By agreeing to narrow discovery and choosing an arbitrator who will support narrowed parameters, parties can save both time and money.

### Consider Dispositive Motions

Parties can decrease both the time and cost of arbitration by using dispositive motions. Filing and arguing dispositive motions allows parties to obtain complete or partial resolution of issues without a full evidentiary hearing. Arbitrating parties, however, rarely exploit dispositive motions, partly because they think arbitration rules make them impermissible.

One associate general counsel for a multinational corporation has remarked that his company decided to remove arbitration clauses from the corporation’s employment contracts primarily because arbitration would not permit the company to use dispositive motions. Leslie A. Gordon, *Clause for Alarm*, ABA J., Nov. 2006, at 19. The general counsel was dissatisfied with arbitration because, in his words, “[y]ou still have to hire outside counsel, so you’re not saving a lot of money. Plus, arbitration is missing a key tool for defendants: the pos-

sibility of summary judgment.” *Id.* Under some current rules, however, parties may file dispositive motions.

Recently, several arbitration organizations, recognizing the usefulness of dispositive motions, have amended procedural rules to explicitly allow arbitrators to hear and rule on dispositive motions. For example, Section 15(b) of the Revised Uni-

Courts from several jurisdictions have upheld arbitrators’ authority to grant dispositive motions.

form Arbitration Act specifically grants an arbitrator authority to hear dispositive motions:

An arbitrator may decide a request for summary disposition of a claim or particular issue: 1) if all interested parties agree; or 2) upon request of one party to the arbitration proceedings if that party gives notice to all other parties to the proceeding, and the other parties have a reasonable opportunity to respond.

Similarly, JAMS allows summary disposition. In its latest set of comprehensive arbitration rules, JAMS vests an arbitrator with the ability to grant either partial or total dispositive motions. JAMS Rule 18 states that “[t]he arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.” JAMS Comprehensive Arbitration Rules & Procedures R. 18, July 15, 2009.

Other arbitration rules, although not specifically addressing dispositive motions, implicitly allow arbitrators to hear and rule on dispositive motions. The American Arbitration Association’s Employment Rule 39(d) states that an arbitrator “may grant any remedy or relief that would have been available to the parties had the matter been heard in court...” Combining American Arbitration Association Employment

Rule 39(d) with Federal Rule of Civil Procedure 56(b), the federal rule allowing parties to move for summary judgment, permits arbitrators to grant a total or partial motion for summary judgment.

Additionally, Rule 30 (b) of the American Arbitration Association Commercial Arbitration Rules authorizes arbitrators to conduct proceedings expeditiously and to

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focus the parties' presentations on dispositive issues:

The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case. Therefore, an arbitrator has the authority to hear and rule on dispositive motions because he or she may conduct a hearing and dispose of the issues expeditiously.

Moreover, courts from several jurisdictions have upheld arbitrators' authority to grant dispositive motions, even without explicit rules. See *Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, 205 F.3d 1340, 2000 WL 178554, at \*5-6 (6th Cir. Feb. 8, 2000) (upholding an arbitrator's award granting the defendant's dispositive motion before the arbitrator allowed the parties to conduct discovery); *Intercarbon Bermuda, Ltd. v. Caltex Trading and Transport Corp.*, 146 F.R.D. 64, 72 (S.D.N.Y. 1993) (upholding that the arbitrator's decision to rule on documentary evidence alone without hearing live testimony did not provide a basis for vacating the award); *Hamilton v. Sirius Satellite Radio, Inc.*, 375 F. Supp. 2d 269, 278 (S.D.N.Y. 2005) (upholding the arbitration panel's order granting Sirius Radio's motion for summary judgment).

While courts generally are inclined to approve arbitration awards based on dis-

positive motions, parties should bolster an arbitrators' authority to hear such motions by prospectively granting arbitrators that authority. Initially, in a contract, if the contract will require arbitration of disputes, a drafter has two options to ensure that an arbitrator can rule on dispositive motions without fearing vacatur. First, a drafter can specify in a contract that an arbitrator has the power to hear dispositive motions. However, size constraints may make specifications impractical.

Alternatively, a contract drafter can incorporate an entire set of rules that explicitly permits an arbitrator to hear and decide dispositive motions into a contract, such as the Revised Uniform Arbitration Act's rules. Adopting an entire set of rules will allow a drafter to ensure favorable procedure, while conserving a contract's limited space. Adopting an entire set of rules en masse, however, potentially can have negative effects. A drafter must be mindful of all rules in a particular set, cautiously analyzing all possible effects, before adopting an entire set of rules.

If arbitration originates independent of a contract, or if a contract from which arbitration stems does not explicitly grant an arbitrator authority to rule on dispositive motions, parties can agree to allow dispositive motions when planning their scheduling orders. Many rules make scheduling orders mandatory. Alternatively, parties can independently choose to incorporate scheduling orders into an arbitration. In these situations, parties can agree that an arbitrator will have explicit authority to hear and rule on dispositive motions. The problem that parties may encounter, defendants, in particular, is that the adverse party may not agree to allow such motions, especially if it could potentially result in an arbitrator dismissing a portion of the party's claim.

In conclusion, a summary judgment hearing is almost invariably shorter, simpler, and less cumbersome than a full-scale evidentiary hearing, and most arbitration rules either explicitly or implicitly grant arbitrators the authority to rule on summary judgment motions. To avoid appeals, however, make sure that the authority has been explicitly granted either in a contract by reference or by adopting wholesale a set of rules that grants that authority. Also, if

a contract has not vested an arbitrator with the authority to hear and rule on dispositive motions, if all parties will agree, they can vest an arbitrator with authority conveniently through a scheduling order.

### Impose Evidentiary Hearing Duration Restrictions

The time that parties spend in an evidentiary hearing constitutes the lion's share of arbitration expenses because of the arbitrator's fees. As a matter of fact, an evidentiary hearing constitutes up to 60 percent of an arbitrator's fees in the average arbitration. Many arbitrators will not restrict the duration of hearings because they have a financial stake in extending the duration, and many will not restrict the duration because of the success rates of challenges to arbitration awards associated with abbreviated proceedings. See Mary Swanton, *System Slowdown: Can Arbitration Be Fixed?* INSIDE COUNSEL, May 1, 2007.

Parties may restrict a hearing's duration in a number of ways. The most obvious way is to limit, by agreement, the number of days spent in the evidentiary hearing. Additionally, parties may stipulate to facts and address witness objections before a hearing by filing motions in limine. Another less obvious way to limit the amount of time spent in a hearing is to limit posthearing briefing. Such briefing usually rehashes the facts and arguments presented at the hearing, which adds little value to the proceedings at a high cost. Finally, parties can consider submitting very extensive prehearing briefs. Prehearing briefs that fully develop the issues of a case allow an arbitrator to make a well-informed decision and will decrease the duration of a the hearing.

Shortening an evidentiary hearing certainly leads to immediate cost savings. With the average arbitrator costing more than \$1,500 per day, limiting the evidentiary hearing duration can result in vast savings, especially with arbitration panels with multiple arbitrators. See Christopher Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 820 (2007-2008). A party must weigh this technique, however, against the need to present its case, and in some situations, a party could decide against using it.

## Curb the Appealability of an Award

Under the Federal Arbitration Act, a court must affirm an arbitration award unless the award is vacated, modified, or corrected. 9 U.S.C. §9. According to the act, a court may only vacate an award based on corruption or fraud in obtaining the award, evident partiality or corruption by the arbitrator, prejudicial misconduct by the arbitrator, or an award that exceeded the arbitrator's authority. *Id.* at §10. Courts have added "complete irrationality" and "manifest disregard of the law" as additional grounds for vacatur. Joseph L. Daly & Suzanne M. Scheller, *Strengthening Arbitration by Facing its Challenges*, 38 QUINNIPIAC L. REV. 67, 84 (2009); see also *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1065 (8th Cir. 2003); *Hoffman v. Cargill, Inc.*, 268 F.3d 458, 461 (8th Cir. 2003). Courts may only modify or correct arbitration awards when they involve evident miscalculation or mistake, when the arbitrator makes an award based on a matter not submitted, or when "the award is imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. §11.

Although judicial review seems limited under the Federal Arbitration Act, parties often appeal arbitration awards, even though the appeals rarely succeed. Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 110 (1997). The appeal process reduces or

even eliminates the cost savings traditionally associated with arbitration. See *id.* Thus, if parties can contractually limit the ability to appeal unfavorable arbitration awards, they potentially can save money by reducing appellate litigation costs. Further, establishing appealability limits may also encourage settlement because if parties know that appellate review is limited, they may not want to allow an arbitrator to decide a case on the merits. Authority indicates that courts generally will enforce contractual limits on arbitration appeals.

For instance, *Van Duren v. Rzasa-Ormes*, 926 A.2d 372, 374 (N.J. Sup. Ct. 2007), supplies some authority. In that case, the plaintiff and the defendant were originally partners in a business venture. *Id.* at 374. After a dispute arose, the parties executed a "Binding Arbitration Agreement" that stated that the arbitration award was "not subject to an appeal to any authority in any forum." *Id.* at 374–375. The plaintiff sought to confirm the arbitrator's ultimate award, and the defendant cross-moved for vacatur. *Id.* at 376. The trial court confirmed the award for reasons unrelated to the appealability clause, and the defendant appealed. *Id.* at 377. The Superior Court of New Jersey held that an agreement limiting appealability was enforceable when the two agreeing parties had equal bargaining power, but only if the agreement did not preclude *all* judicial review. *Id.* at 381. Because the trial court did review the award despite the ap-

pealability clause, the defendant obtained meaningful judicial review. *Id.* The clause, therefore, operated to bar the appellate court from reviewing the award, and the appellate court dismissed the appeal. *Id.* at 382. Other courts have ruled in accord with *Van Duren* and enforced clauses limiting the ability to appeal arbitration awards. See, e.g., *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005).

In sum, arbitration awards seem difficult to appeal, but parties are frequently required to litigate them. By contractually limiting the scope of judicial review, parties may save time and money.

## Conclusion

Attorneys' fees and other litigation expenses have dramatically increased the costs of arbitration. For arbitration to remain a viable alternative to lawsuits requires substantially reducing these costs.

Among the possibilities for reducing arbitration costs are mediating early, either voluntarily or involuntarily; carefully designing scheduling orders and holding early scheduling conferences; strictly limiting discovery; using dispositive motions; shortening evidentiary hearings; and prospectively limiting award appeals. Only by using these and other devices to reduce costs and to simplify procedure will arbitration continue to be an effective tool for parties and their counsel. 