Dinsmore&Shohl LLP
ATTORNEYS

Methods for Cost-Efficient Resolution in Arbitrations

August 12, 2010

Richard H.C. Clay , J. Tanner Watkins

As seen in the August issue of For The Defense published by DRI - The Voice of the Defense Bar.

Arbitration emerged as a mainstream form of dispute resolution because many litigants were fed up with the cost and time of traditional litigation. Parties saw arbitration as an efficient, cost-effective alternative to litigation, and flocked to it like a cure-all elixir. The litigants, however - undoubtedly used to ways of traditional litigation - brought along 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 it from cost-efficient and speedy to expensive, slow and frustrating.

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 Slowdown: Can arbitration be fixed?*, Inside Counsel, (May 1, 2007). In fact, many parties – especially companies – are removing mandatory arbitration language from underlying business and employment contracts. Id. The parties who are jumping ship are doing so mainly because of a perception of high costs and time.

We need to realize that the model of 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 litigants' use of the arbitration process. Because parties have treated arbitration like litigation, the arbitration process has manifested itself into something analogous to litigation.

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

Reasons Why Arbitration Costs Are Rising

Understanding the reasons why costs have risen requires an explanation of the factors that make up arbitration's costs. Arbitration costs are broken down into three primary components: 1) administration costs; 2) arbitrators' fees (arbitrators' rates times the amount of time spent officiating the controversy); and 3) costs of litigation – which includes attorney's fees. Christopher Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J. L. Reform 813, 816 (2007-2008). Administration costs and arbitrators' rates have remained relatively constant throughout the recent years. Discovery, motion practice, and appeals have become increasingly similar to ordinary litigation. Because of this, costs of arbitrators' overall fees and litigation expenses have risen, increasing costs for all parties and reducing or eliminating traditional savings.

Administration costs are the fees parties must pay to have their dispute heard by an arbitration association. 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 upon a sliding scale dependant upon the amount in controversy. Currently, administration fees for commercial arbitrations range from a fee of $975 for claims less than $10,000 to a fee of $18,600 for claims greater than $10,000,000. See Am. Arbitration Ass'n Commercial Arbitration Rules and Mediation Procedures (amended and effective January 1, 2010).

Little evidence exists suggesting 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. Arbitration Ass'n Commercial Arbitration Rules and Mediation Procedures (amended and effective Sept. 1, 2007)). In fact, many arbitration organizations, including the American Arbitration Association, have instituted procedures that decrease administration fees if parties settle the matter before proceeding to the final evidentiary hearing. Am. Arbitration Ass'n Commercial Arbitration Rules and Mediation Procedures (amended and effective January 1, 2010).

The second cost of arbitration is the arbitrator's fee. Unlike courts, arbitrators charge fees, usually on an hourly or daily basis, to hear and rule on litigants' 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 commercial arbitrators' fees ranged from $600 per day to $5,000 per day. Id. The mean fee per day for commercial arbitrators 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 the recent years. The overall costs of arbitrators' fees, however, have drastically risen due to increased discovery and longer hearings.

Litigation expenses are the primary reason why arbitration expenses have increased in recent years. Initially, parties to arbitration have the expense of enforcing the underlying arbitration clause in court to allow the controversy to proceed to arbitration. Jonathan Wilson, former general counsel for Interland, Inc., 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. In fact, from 2005 through 2007, courts across the country published more than five hundred 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) (the court upheld a decision granting the defendants' motion to compel arbitration 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) (the court granted the defendant's motion to compel arbitration pursuant to a binding arbitration clause in an underlying contract, 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, lies in the fact that the parties have to go through the time and expense of litigating the right to have the controversy arbitrated before proceeding to arbitration.

Litigation expenses are also increasing because the arbitration process has become more analogous to a lawsuit. To a greater extent, parties operating under standard arbitration rules are engaging in extended discovery and motion practice. Thomas Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 6 (2010). Moreover, hearings are much longer because the parties and the arbitrator are attempting to avoid subsequent vacatur due to perceived procedural injustices. *Id.* These traditional courtroom practices are increasing time and cost in a dramatic fashion. *Id.*

Methods Parties May Utilize to Lessen Costs Associated With Arbitrations

The increased costs of arbitration combined with current economy have litigants scrambling to find ways to save money. Enlisting some or all of the following techniques may help litigants to save money (and time) while retaining the qualities anticipated and expected of arbitration. Prior to arbitration, parties should consider voluntary or involuntary mediation. Upon commencement of arbitration, the parties should consider

engaging in a scheduling conference and submitting to an ensuing scheduling order. Finally, during arbitration, the parties should consider limiting discovery, providing for the ability to file dispositive motions, limiting the amount of time spent at the hearing of the case and prospectively agreeing to limit the appealability of the arbitration award. These techniques will be considered in order.

1. Engage in Pre-Arbitration Mediation with an Independent Mediator

Parties can reduce arbitration costs by engaging in mediation prior to the arbitration hearing. Settling prior to an arbitration hearing will save the parties the fees and expenses 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 not settling and allows the parties 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 (2008). Mediation can also narrow the scope of issues to be arbitrated.

Mediation can either be voluntary or involuntary. *See* Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 FORDHAM L. REV. 1247, 1253-1255 (2009). Parties can voluntarily engage in mediation at any time. Indeed, such voluntary action 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 the parties do not wish to engage in mediation. Depending on the specific factual situation, involuntary mediation may be appropriate.

Parties can be forced to participate in mediation in one of two ways. First, the underlying contract that requires the parties to arbitrate can also require the parties to mediate before the arbitration hearing. For the drafting attorney who wishes to reduce expenses, this requirement should be seriously considered. Second, the arbitrator can order the parties to mediate, similar to the way that many state and federal court judges require mediation prior to trial. *See* Will Pryor, *Alternative Dispute Resolution*, 61 SMU L. REV. 519, 524 (2008). Before ordering the parties to mediate, however, the arbitrator should consider the specific circumstances of the case. If one or both parties have expressed a complete unwillingness to settle, mediation may be a waste of everyone'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 the case ultimately ends up in mediation, it is vital that the mediator is completely independent from the arbitrator(s) assigned to the case. A key component to successfully mediating a case is the ability of the parties to be fully candid with the mediator. 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 the mediator will later judge the case on the merits, a party may be less likely to be completely truthful with the mediator. *See id.* Moreover, an arbitrator who also serves as a mediator may later be subject to disqualification from the case due to an ethical conflict. *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 the arbitration process by fostering an early resolution to contested claims or narrowing the issues argued at the arbitration hearing. Mediation, however, is not appropriate in all cases, and parties and arbitrators should consider the specific circumstances of the case at issue before deciding that mediation is proper.

2. Impose A Mandatory Scheduling Conference And Resulting Scheduling Order

Parties to arbitration should consider submitting to a scheduling conference and resulting scheduling order. Similar to scheduling conferences in state or federal court, arbitration scheduling conferences are used by arbitrator(s) to impose discovery limits and deadlines, limits on motion practice, and hearing dates and lengths. Frequently, in proceedings that are either complex or involve a large amount in controversy, the governing rules mandate that parties must submit to some form of a scheduling conference. *See* American Arbitration Association's Commercial Arbitration Rules, Procedures for Large, Complex Commercial Disputes,

L-3 (June 1, 2009). Even in the absence of a mandatory scheduling conference, parties should still consider submitting to a scheduling conference because of the certainty such conferences and orders bring.

Scheduling conferences offer many implicit benefits to litigants. Initially, scheduling conferences can give parties a strategic advantage in the arbitration. Scheduling conferences inherently allow parties to ascertain impressions of the opposition's ability or willingness to mediate some or all of their 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 the arbitration. Additionally, scheduling conferences are a chance for litigants to argue for the need of cost saving tactics such as limited discovery and motion practice, and limited evidentiary hearings.

Scheduling orders also offer many benefits to litigants. Scheduling orders impose a plan upon which the parties can rely upon and for which they can budget by assisting counsel in preparing reasonable estimates on the cost of discovery, motion practice, evidentiary hearings, and appeals. With the scheduling order, counsel can more accurately provide clients with information on the costs of the case. Such information is also useful in determining the need for mediation. Though scheduling orders in isolation may not create any savings, at the very least scheduling orders are useful, because they provide certainty upon which the parties may rely and budget.

3. Place Limits on Discovery

In recent years, the cost of arbitration has increased due to increased pre-hearing 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 more extensive discovery. *See id.* at 13. Attorneys and clients promote extensive discovery because it is similar to the discovery allowed in traditional court-based litigation. Attorneys and clients also favor extensive discovery because of the hopes that additional discovery will help their individual case. *Id.* Arbitrators compound the problem. Many arbitrators are reluctant to limit discovery due to the potential for reversal and the desire to placate the parties in hopes of obtaining future appointments. *Id.*

Despite the general unwillingness of the participants to limit discovery, given the high costs of discovery, such limits are an excellent way to save costs for all parties. Indeed, according to a 1999 federal court newsletter, document discovery accounts for fifty 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", it can account for up to ninety percent of litigation costs. *Id.* Of course, discovery cannot be entirely eliminated; rather, the parties to arbitration must agree on a standard for discovery. The question then becomes what standard is applicable. Fortunately, a number of standards are available to parties to choose from, though each standard gives the arbitrator a great deal of discretion.

The American Arbitration Association ("AAA") Commercial Arbitration Rules provide that the arbitrator, "consistent with the expedited nature of arbitration," may order the production of documents and other information. AAA Commercial Arbitration Rule 21(a). Notably, "[t]he arbitrator is authorized to resolve any disputes concerning the exchange of information." *Id.* at 21(c). The AAA 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." AAA Procedures for Large, Complex Commercial Disputes, Rule L-4(c).

Other arbitration standards provide for 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 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. *Id.* at § 17(d).

Clearly, the litigants and arbitrators have broad discretion in determining the appropriate amount of discovery for any given case. Therefore, the key to limiting discovery, and thereby reducing costs, in a commercial arbitration is twofold. First, the parties should agree to the scope of discoverable materials prior to beginning arbitration. Of course, each case is different, and it is impossible to fashion a hard-and-fast rule regarding what should be discoverable in every case. JAMS, however, has created a list of relevant factors for consideration by arbitrators in determining the scope of discovery. *See* JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases. Parties to arbitration 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 come to an agreement on the scope of discovery. *See id.* Second, the parties should choose an arbitrator who is not hesitant to limit discovery. Simply put, an arbitrator who is willing to limit discovery can save the parties' time and money without affecting the fairness of the proceedings. Notably, an arbitrator should not limit discovery because of a fear of reversal, since 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).

The costs of extended discovery can greatly increase the total cost of arbitration. By agreeing to limited discovery and choosing an arbitrator who will not order extended discovery, parties can save both time and money.

4. Consider Dispositive Motions

Parties can decrease both the time and cost of arbitrations by utilizing dispositive motions. The ability to file and argue dispositive motions allow parties to obtain complete or partial resolution of issues without utilizing a full evidentiary hearing. Parties to arbitration, however, rarely utilize dispositive motions.

Many litigants are not aware that dispositive motions are available at arbitration. An associate general counsel for a multi-national corporation remarked that his company decided to take arbitration clauses out of its employment contracts. Leslie A. Gordon, *Clause for Alarm, A.B.A. J.*, Nov. 2006, at 19. He cited lack of the ability to file dispositive motions as a primary reason for the change. *Id.* 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 possibility of summary judgment.'" *Id.* Under the current rules, however, parties may file dispositive motions.

Recently, several arbitration organizations, recognizing the potential utility of dispositive motions, have provided for them in procedural rules. A number of arbitration rules explicitly allow arbitrators to hear and rule on dispositive motions. For example, Section 15(b) of the Revised Uniform 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, a nationwide arbitration organization, allows for summary disposition. In its latest set of comprehensive arbitration rules, JAMS vests the 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, The Resolution Experts, Comprehensive Arbitration Rules & Procedures, Rule 18 (July 15, 2009).

Other sets of arbitration rules, although not specifically addressing dispositive motions, impliedly allow

arbitrators to hear and rule on dispositive motions. The American Arbitration Association's Employment Rule 39(d) provides, in pertinent part, that the arbitrator "may grant any remedy or relief that would have been available to the parties had the matter been heard in court …" Combining AAA Employment Rule 39(d) with Fed. R. Civ. P. 56(b) – the 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 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, the arbitrator arguably has the authority to hear and rule on dispositive motions because he or she has the ability to conduct the hearing in such a way to hear and dispose of the issues expeditiously.

Moreover, courts from several jurisdictions have upheld arbitrators' ability to grant dispositive motions, even in the absence of a rule explicitly allowing such activity. *See Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, 20 SF.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 any 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 are inclined to approve such awards, parties should bolster the arbitrators' ability to hear such motions by prospectively granting the arbitrators authority. If the arbitration is based on an underlying contractual agreement, there are two ways to ensure the arbitrators hearing the claim will be able to rule on such motions without fear of possible vacatur. Initially, a drafter can include the power of an arbitrator to hear dispositive motions in the underlying contract. However, due to size constraints, such specific provisions may not be practical.

Alternatively, a drafter can incorporate into the underlying contract an entire set of rules – such as the Revised Uniform Arbitration Act's procedural rules - that explicitly permits the arbitrators to hear and decide dispositive motions. An adoption of an entire set of rules will allow the drafting party to ensure favorable procedure, while conserving the contract's limited space. An en masse adoption of an entire set of rules, however, has a potential to have negative effects. A drafter must be mindful of all rules in a particular set, because all will be adopted by such a procedure. Therefore, a drafter should proceed cautiously, analyzing all possible effects, before adopting an entire set of rules.

If the arbitration is not based upon an underlying contract, or if the underlying contract does not explicitly grant the arbitrator authority to rule on dispositive motions, parties can allow for dispositive motions when planning their scheduling orders. Many rules provide for mandatory scheduling orders. Alternatively, parties can independently choose to incorporate scheduling orders into their individual arbitration. In these situations, parties can agree that the arbitrators will have explicit authority to hear and rule on dispositive motions. The problem parties may encounter (defendants, in particular), is that the adverse party may not agree to allow for such motions, especially if such agreement could potentially result in a portion of their claim being dismissed.

In conclusion, a summary judgment hearing is almost invariably shorter, simpler, and less cumbersome than a full-scale evidentiary hearing, and most rules either explicitly or implicitly grant the arbitrators with authority to rule on such motions. To avoid appeals, however, such authority should be explicitly granted

either by reference or by wholesale adoption of an underlying set of rules that grants such authority. Also, if not included in an underlying contract, a scheduling order is a convenient way for parties to vest with the arbitrators such power, if all parties will agree.

5. Impose Limits on the Amount of Time Spent In the Evidentiary Hearing

The time spent in a hearing constitutes the lion's share of the expenses as they relate to the arbitrators' fees. As a matter of fact, the evidentiary hearing constitutes up to sixty percent of the fees in the average arbitration. Moreover, many arbitrators are unwilling to shorten hearings, due to a financial stake in extending the proceedings, and the higher probability of a successful challenge to an arbitration award based upon an abbreviated proceeding. *See* Mary Swanton, System Slowdown: *Can arbitration be fixed?*, Inside Counsel, (May 1, 2007).

Parties may shorten hearings in a number of ways. The initial and most obvious way to shorten the hearing 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 the hearing by filing motions *in limine*. Another less obvious way to limit the amount of time spent in the hearing is to place limits on post-hearing briefing. Such briefing is usually a rehashing of the facts and arguments presented at the hearing, which adds little value to the proceedings at a high cost. Finally, parties can consider more extensive pre-hearing briefs. Pre-hearing briefs that fully develop the issues of the case allow the arbitrator(s) to make a more informed decision with less time spent in the hearing.

Shortening the evidentiary hearing certainly leads to immediate savings in costs. With the average arbitrator costing more than $1,500 per day, any limiting of the time period can result in vast savings, especially on panels with multiple arbitrators. *See* Christopher Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J. L. Reform 813, 820 (2007-2008). This technique, however, must be weighed against the need of a party to present its case, and it is therefore not applicable to all situations.

6. Place Limits On The Appealability Of The Arbitration 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 there was an evident miscalculation or mistake in the award, 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 review is seemingly limited under the Federal Arbitration Act, parties often appeal arbitration awards, even though such appeals are rarely successful. 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 adverse arbitration awards, the parties can potentially save money by reducing appellate litigation costs. Further, such limits on appealability may also encourage settlement, since parties who know that appellate review is limited may be less willing to allow the arbitrator to decide the case on the merits. There is authority to indicate that such contractual limits on appealability are enforceable.

In *Van Duren v. Rzasa-Ormes*, the plaintiff and defendant were originally partners in a business venture. 926 A.2d 372, 374 (N.J. Sup. Ct. 2007). 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 is enforceable when entered into by two parties of equal bargaining power, but only to the extent that the agreement does not preclude all judicial review. *Id.* at 381. Because the trial court did review the award despite the appealability clause, the defendant obtained meaningful judicial review. *Id.* The clause therefore operated to bar the appellate court from reviewing the award, and the 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 are seemingly difficult to appeal, but parties are frequently required to litigate such appeals. By contractually limiting the scope of judicial review, parties may save time and money.

Conclusion

Attorneys' fees and other litigation expenses have increased the costs of arbitration dramatically. For arbitration to remain a viable alternative to actual lawsuits, these costs will have to be substantially reduced.

Among the possibilities for reducing arbitration costs are early voluntary and involuntary mediation; carefully designed scheduling orders and early scheduling conferences; strict limits on discovery – either agreed upon by the parties or imposed by the arbitrators; the use of dispositive motions; shortened evidentiary hearings; and prospective limits on appeal. Only through the use of these and other devices for cost reduction and simplification will the use of arbitration continue to be an effective tool for parties and their counsel.