



Control costs in arbitration

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Arbitration was once thought to be a cost-efficient alternative to litigation. But arbitration costs today are increasingly rivaling those of traditional litigation. Many clients and lawyers find themselves entrenched in arbitration proceedings — with costs mounting and time passing — wondering what happened to arbitration's supposed efficiency advantages.

It is important to remember that, while arbitration provides favorable cost-limiting tools that are not available in litigation, they are just that, tools. Parties in a dispute have the flexibility to choose whether to avail themselves of such tools, and in the midst of a dispute, are often incentivized to expand proceedings in expensive ways.

Perhaps the best way to reduce run-away costs is to negotiate cost-saving components into the arbitration clause of the underlying agreement. In the absence of an actual dispute, parties are more likely to agree to restrict future dispute-related costs. There is no one-size-fits-all arbitration clause that will work well in every situation, but the more parties are able to predict the nature and scope of disputes that may arise, the more tailored the arbitration clause can be. The following are some cost-saving components that parties add to arbitration clauses to facilitate future dispute-related cost control.

The American Arbitration Association and the International Chamber of Commerce are established and specialized arbitration institutions that are available to administer the arbitration process. But institutions charge administrative fees for services and use of facilities.

Parties can avoid these fees by agreeing to use an ad hoc arbitration process. If so, they should also consider agreeing to other parameters of the arbitration proceeding since they will not have an institution imposing such parameters for them.

For example, the parties might agree to the number of arbitrators that will hear each dispute. A single arbitrator is obviously less expensive than a panel of multiple arbitrators. Similarly, to avoid costs and delays related to disagreements and deadlock, parties can agree in advance to a method for appointing those arbitrators. Party-appointed, non-institution arbitrators are often less expensive than institution-appointed arbitrators.

It is particularly efficient to agree to the procedural rules that will apply, and parties should consider agreeing to expe-

dated or fast-track procedural rules, such as those provided by the AAA. Parties can also reduce future costs by agreeing to the applicable law and the courts in which they can bring award confirmation and challenges.

When electing ad hoc arbitration procedures, parties should consult counsel with expertise in jurisdictions where a resulting arbitration award may be confirmed or enforced. Chinese courts, for example, do not recognize awards rendered by ad hoc arbitration proceedings.



One of the best efficiencies offered by arbitration is that it allows parties the flexibility to restrict discovery and motion practice — the two biggest sources of escalated costs in traditional litigation. Parties should consider agreeing in advance to limit both.

For example, as is typical in arbitration, parties can agree that depositions and written discovery will not be allowed, and that only limited requests for document disclosures will

be permitted.

Parties can further limit costs by restricting the number of briefs exchanged on each issue (for instance, foregoing the replies and sur-replies that sometimes appear in litigation). To help reduce post-hearing costs, they can impose a limit on the amount of time the arbitrator has to render an award after the evidentiary hearing. Also, to avoid having to pay for an arbitrator to consider the issue, the parties can agree to a method for allocating the parties' dispute-related costs in advance (for instance, loser pays all or each side bears its own costs).

While there will always be some disputes where high costs are necessary, careful consideration of the arbitration clause at the drafting stage can afford parties the opportunity to import costs and time-saving tools into the process.

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