The Costs of Arbitration

Click Here for information about ordering the full report.

"The speed and affordability of arbitration are perhaps its most discussed benefits... "
-U.S. Chamber of Commerce

"Arbitration can save parties 70-80% of the cost of litigating these cases."
-Ed Anderson, National Arbitration Forum

"Arbitration still costs less than litigation"
-The Wall Street Journal

"Less costly"
-AT&T Broadband

"Cost-effective"
-Sen. Jeff Sessions

"Usually it is quicker, less expensive, and more informal than litigation. Not always... "
-Florence Peterson, American Arbitration Association

Remarkably, although the claim is frequently made that arbitration costs less than litigation, no research has ever been undertaken to substantiate it. No interest group has commissioned a study. No Member of Congress has asked for a General Accounting Office report.

Writing in 1992 about court-annexed ADR, Stanford law professor Deborah Hensler cautioned, "Whether alternative dispute resolution procedures will reduce private litigation costs is still an open question. Court-administered arbitration has shown mixed results in this regard." Recently she repeated her caveat about a paucity of empirical research, explaining, "Because public support for ADR is so frequently justified on cost savings grounds, program administrators especially fear cost-benefit assessments."

Here, Public Citizen presents the first comprehensive collection of information on arbitration costs. We find:

- The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that *forum costs*- the costs charged by the tribunal that will decide the dispute- can be up to five thousand percent higher in arbitration than in court litigation. These costs have a deterrent effect, often preventing a claimant from even filing a case.

  Public Citizen's survey of costs finds that, for example, the forum fee for a $60,000 employment discrimination claim in the Circuit Court of Cook County, Illinois is $221. The forum fees for the same claim before the National Arbitration Forum (NAF) would be $10,925, 4,943% higher. An $80,000 consumer claim brought in Cook County would cost $221, versus $11,625 at NAF, a 5,260% difference. These high costs are not restricted to NAF; for the same $80,000 claim, the American Arbitration Association (AAA) would charge the plaintiff up to $6,650, and Judicial Arbitration and Mediation Services (JAMS) would charge up to $7,950, amounting to a 3,009% and 3,597% difference in cost, respectively.

OUR EXPERTS
Learn more about our policy experts.

Media Contacts

Angela Bradbery, Director of Communications
(202) 588-7741
abradbery@citizen.org, Twitter

Barbara Holzer, Broadcast Manager
(202) 588-7716
bholzer@citizen.org

Dorry Samuels, Press Office Coordinator
(202) 588-7742
dsamuels@citizen.org, Twitter

Other Important links

Press Release Database
Citizen Vox blog
Texas Vox blog
Consumer Law and Policy blog
Citizen Energy blog
Eyes on Trade blog
Myspace/publiccitizen
Facebook/publiccitizen

Follow us on Twitter

FOLLOW

- Arbitration costs are high under a pre-dispute arbitration clause because there is no price competition among providers. Companies that want to use arbitration costs as a barrier, to prevent consumers and others from asserting their legal rights, have no incentive to arrange low-cost arbitration services. Instead, it is to their advantage to seek out the highest-cost arbitration providers. While experience has shown that many lawyers are willing to serve as arbitrators for nominal fees, the market provides no mechanism to match volunteer arbitrators to cases in which they are needed the most.

  The mandatory arbitration clause's negative effect on price competition can be seen in AAA's handling of insurance claim arbitration. From 1989 to 2000, in cases submitted to AAA on a *post-dispute* basis, AAA charged each party a total of only $300 for administration and arbitrator fees. But cases arising under a *pre-dispute clause* were governed by AAA's Commercial Rules, with much higher filing fees and regular hourly arbitrator fees. For example, a health insurer's denial of coverage for a bone marrow transplant, submitted post-dispute under the Insurance Claims Procedures, would cost the consumer $300. But for a case governed by a pre-dispute clause, AAA charged a much higher fee. Tammy Sharpton, who arbitrated such a case in 1997, was charged $5,290.23, *eighteen times* what AAA would have charged had it been competing with other arbitration providers and the courts.

- Arbitration costs will probably always be higher than court costs in any event, because the expenses of a private legal system are so substantial. The same support personnel that expedite cases at a courthouse, such as file clerks and court administrators, are also necessary to manage arbitration cases. But because arbitration provider organizations handle fewer cases over larger geographic areas, the economy of scale in a court clerk's office cannot be achieved, increasing the administrative cost per case. Thus, while it costs the Clerk of the Circuit Court of Cook County an average of $44.20 to administer a case, AAA's administrative cost per case averages $340.63, about 700 percent more.

- Arbitration saddles claimants with a plethora of extra fees that they would not be charged if they went to court. For example, the National Arbitration Forum charges $75 to issue a subpoena. A lawsuit litigant can obtain a subpoena form for free from the court, oftentimes downloading it off the Internet. NAF also charges fees for discovery requests ($150) and continuances ($100), occurrences so ubiquitous in litigation that they must be viewed as inevitable. The American Arbitration Association (AAA) charges extra fees for use of a hearing room.

- Taking a case to arbitration does not guarantee that a consumer or employee will stay out of court, making arbitration still more costly. First, a plaintiff bound by a *one-way arbitration clause*, the most common type, may be forced to go to court to litigate the same issues that are being decided in the arbitration. This is because the other party to the clause has retained its right to sue in court. Second, if crucial documents or testimony must come from a third party, court litigation is necessary to enforce subpoenas. In fact, due to a quirk in arbitration law, sometimes two different federal lawsuits are necessary to enforce one subpoena. Third, if a plaintiff wins a case in arbitration but the defendant refuses to honor the award, the plaintiff must ask a judge to enforce the award.

- The costs of arbitration are so high that even some businesses that choose to include arbitration clauses in contracts with consumers and farmers have refused to pay the fees.

- High arbitration costs can also be used to bludgeon an adversary. For instance, the party being sued can file a motion to dismiss or a motion for summary judgment. The claimant must then advance additional funds to pay the arbitrator to decide the motion, even if the motion has no merit. The defendant can also refuse to provide discovery information, in which case the claimant must advance funds to the arbitrator to decide the discovery dispute. In one case, for which we have reproduced copies of the arbitration bills, the claimant was unable to pay and had to abandon the case.

- The oft-cited benefits that arbitration can offer in exchange for higher fees will seldom benefit consumer litigants. Not only is there is no evidence that arbitration reduces the overall *transaction costs of litigation* (e.g. witness fees, attorney fees, discovery costs), but nobody has expounded a coherent theory to explain how arbitration *could* reduce such costs except in a few categories of cases. Indeed, Public Citizen's careful examination of the cost savings claim demonstrates that in the vast majority of cases, arbitration will necessarily *increase* the transaction costs of litigation.

To order a complete report call Public Citizen's Publication Office:
1-800-289-3787, for additional orders. The report's publication number is B9028.
Price is $50.

Major credit cards accepted. Or write to:
Members Services
Public Citizen
1600 20th Street, N.W.
Washington, D.C. 20009