



2019 Construction Conference
September 25 – 27, 2019
San Diego, CA

Myths, Realities, Pitfalls and Advantages of Binding Arbitration

I. FEDERAL ARBITRATION ACT (9 USC Ch.1)

Enacted in 1925, the purpose of the Federal Arbitration Act (the “FAA”) was to ensure the validity and enforceability of arbitration agreements and resulting arbitration Awards. Provided below is a discussion of key elements of the FAA and their impact on the arbitration process.

A. Validity, Irrevocability and Enforcement of Arbitration Clauses

Reflecting the hostility with which English courts viewed arbitration through the early 20th Century American courts actually disfavored the process. That began to change with the U.S. Supreme Courts’ 1924 *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, decision that upheld a New York law that compelled arbitration in a dispute over a maritime contract. That decision prompted the enactment of the FAA on a rationale that resonates today: “It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.” H.R No. 96, 68th note 10 at 2, Congress, 1st Session (1924). As such, the FAA provides that a written provision in a contract to submit any disputes to binding arbitration is valid, irrevocable and enforceable (9 USC Ch. 1, §1).

B. Stay of Proceedings

The FAA also provides that, as to any issue referable to arbitration, the court in which suit is pending shall, upon application of one of the parties, stay the trial of the action pending arbitration (9 USC Ch.1, §3). As such, most lawyers understand that once arbitration has been invoked, any underlying litigation is “stayed” until the arbitration process is completed. However, until the relatively recent *Katz v. Cellco Partnership*, 794 F.3d 341 (2nd Cir. 2015) decision issued by the Second Circuit, the Circuit Courts were split on that absolute “stay” requirement, with some circuits favoring dismissal during the pendency of arbitration. The *Katz* court conclusively found that Section 3 of the FAA mandates a stay of proceedings pending arbitration.

C. Action to Compel Arbitration

The FAA also provides that a party aggrieved by the failure or refusal of another to arbitrate under a written agreement to do so may petition the court for an order directing that the arbitration proceed (9 USC

Ch. 1, §4). Any action to compel a recalcitrant party to arbitrate of course starts with an examination of the validity of the agreement to arbitrate. Are the terms clear ? Is the party that is sought to be compelled a signatory to the agreement ? Has the enforcing party somehow waived arbitration? While these questions must be answered, the FAA nevertheless establishes that with the validity of arbitration unassailable, efforts to compel arbitration are favored.

D. Subpoenas for Records/Witnesses

The FAA vests the arbitrator with authority to issues subpoenas in the name of the arbitrator[s] to compel a witness or third-party to appear as a witness in the arbitration Hearing and/or produce identified documents in the same manner as subpoenas to appear and testify in court. Moreover, the arbitrator can punish the person for contempt in the same manner provided by law for neglect or refusal to attend in U.S. Courts (9 USC Ch.1, §7).

E. Confirmation of Arbitration Award

According to the FAA, within 1 year after an Award is made, a party may apply to a court for confirmation of the Award (9 USC Ch.1, §9). The purpose in seeking court confirmation is to provide a judicial forum for the enforcement or satisfaction of the Award so that court redress is available should the “losing” party not timely or fully satisfy the Award. Along the same lines, Rule R-54(c) of the American Arbitration Association’s (AAA) Rules for Construction Disputes provides that the parties shall be deemed to have consented that judgment upon the arbitration Award may be entered in any federal or state court having jurisdiction thereof. Similarly, Rule 25 of the Judicial Arbitration & Mediation Service’s (JAMS) rules for construction disputes provides that proceedings to enforce, confirm, vacate or modify an arbitration Award are controlled or conducted by the FAA or state law.

F. Vacating an Arbitration Award

Following the dictates of the FAA, courts are reluctant to fully vacate an arbitration award. Pursuant to 9 USC Ch. 1, §10, the FAA’s only grounds for vacating an Award are when, 1) the Award was obtained through corruption, fraud or undue means, 2) there was demonstrated partiality or corruption in the arbitrator’s conduct or determination of the Award, 3) the arbitrator was guilty of misconduct in refusing to postpone the hearing, or the arbitrator refused to hear evidence relevant and material to the controversy; or 4) the arbitrator exceeded his or her powers or executed them imperfectly such that a final Award was not made.

G. Modifying an Arbitration Award

It is almost as difficult to have an Award modified as it is to have it fully vacated. According to 9 USC Ch.1, §11 of the FAA, an Award can only be modified when, 1) the arbitrator makes a material miscalculation of figures or an apparent mistake in describing any person, thing or property referred to in the Award; 2) the arbitrator makes an Award on a matter not submitted to it, unless it is a matter not affecting the merits of the decision upon the matter submitted; or 3) the Award is imperfect in a way that does not affect the merits of the controversy.

H. Appeals

The FAA does not permit a party to appeal an arbitration Award on the merits. Instead, according to 9 USC Ch.1, §16 of the FAA, an appeal may only be taken from an order, 1) refusing a stay pending arbitration, 2) denying a petition to compel arbitration, 3) denying confirmation of an Award, or 4) modifying, correcting or vacating an Award.

I. Waiver

The extent to which a party to an arbitration agreement has nonetheless “waived” its right to arbitrate disputes by initiating, pursuing or participating in formal litigation, is an often invoked issue and one that is fact and circumstance dependent. The participation in litigation based waiver is well understood. However, other circumstances where a party may be deemed to waive the right to arbitrate includes when, 1) a defendant fails to comply with the terms of its own drafted arbitration clause (i.e., failing to pay the arbitration fee); 2) a party engages in litigation in a related lawsuit; and 3) a party excessively delays a motion to compel arbitration. Case law stands for the proposition that a court, as opposed to the arbitrator, must decide if a party has waived its right to arbitrate. Most often the court will look to the extent the opposing party has been prejudiced by the delayed invocation to arbitrate.

J. Arbitrability

Unlike the determination of the extent to which a party has waived its right to arbitrate by the court, the determination of the arbitrability of a dispute or issue is to be decided by the arbitrators. For instance, Rule R-9 of AAA’s Rules for Construction Disputes gives to the arbitrator the power to “rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.” Similarly, JAMS’ Rule 11(b) vests the arbitrator with authority to decide jurisdiction and arbitrability issues.

II. THE AGREEMENT TO ARBITRATE

A. Authority and Duties of Arbitrator

The two most widely used entities to administer construction arbitrations are AAA and JAMS, both of which have adopted detailed rules governing the arbitration process. However, whether arbitrating with AAA or JAMS, the starting point is the same; the parties’ agreement to arbitrate. In that regard, AAA Rule R-2 provides that the authority and duties of the Arbitrator are prescribed by the agreement amongst the parties. Similarly, JAMS Rule 2(a) provides that the parties can agree on any procedure governing the arbitration process as long as those procedures are confirmed in writing.

B. Matters for Agreement

For these reasons, according to AAA’s Rules, the parties can agree on consolidation of related arbitrations or joinder of parties (Rule R-7), the arbitration locale (Rule R-12), the method, selection and number of arbitrators (Rules R-15 and R-18), the form and scope of the arbitration Award (Rules R-47 and R-48), allocation of arbitration fee/expenses and attorney fees to the prevailing party (Rule R-48), law applicable to the dispute, permitted discovery, the jurisdictional amount of the arbitration and procedures governing the arbitration regardless of the amount in controversy (Rule R-1). Similarly, according to JAMS’ Rules, the parties can agree on, among other things, consolidation of related arbitrations (JAMS Rule 6(e)), selection and number of arbitrators (JAMS Rules 7 and 15), procedures for the arbitration (JAMS Rule 15), discovery, including fact and expert depositions (JAMS Rules 16 and 17), and allocation of arbitration fee/expenses and attorney fees (JAMS Rules 24(f) and (g)).

III. AVAILABLE RELIEF

A. Money Damages

Whether a dispute is litigated or arbitrated, the relief typically sought is money damages. Under AAA Rules, as a general rule, different procedures (Resolution of Disputes through Documents Submission, Fast

Track, Regular Track or Large Complex Construction Disputes) apply based on the amount in controversy. Similarly, JAMS' Rules apply to any binding arbitration or dispute in which the parties agree to use the Rules or, in absence of an agreement, for any disputes or claims exceeding \$250,000 (JAMS Rule 1(a)).

B. Dispositive Motions

Pursuant to AAA Rule R-34, the arbitrator may permit dispositive motions to dispose all or part of a claim or narrow the issues in a case. Under JAMS' Rules, dispositive motions are generally not permitted if the parties elect to use JAMS' Expedited Procedures (JAMS' Rule 16.2(h)). However, for regular track cases, an arbitrator may permit any party to file a dispositive motion on any particular claim or issue (JAMS Rule 18).

C. Emergency Relief/Injunctive Relief

AAA's and JAMS' Rules both allow a party to seek emergency relief before the appointment of the arbitrator[s] to prevent irreparable loss or damage or to protect or preserve property (AAA Rule R-39; JAMS Rule 2(c)). In this situation, AAA and JAMS will both appoint an emergency arbitrator within one day who, within two days, will establish a schedule for consideration of the application for emergency relief. Further, an interim Award for emergency relief may be conditioned on the provision of adequate security by the party seeking such relief.

Once the arbitrator[s] is appointed, AAA's and JAMS' Rules vest the arbitrator with authority to take interim measures deemed necessary including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods. Such interim measures may take the form of an interim Award and the arbitrator[s] may require security for the costs of such measures (AAA Rule R-38; JAMS Rule 24(e)).

D. Equitable Relief/Specific Performance

AAA's Rules and JAMS' Rules also vest the arbitrator[s] with the discretion to award equitable relief, including specific performance of a contract (AAA Rule R-48; JAMS Rule 24(c)).

E. Arbitration Fees and Expenses/Interest/Attorney Fees

AAA Rule R-48 requires the arbitrator to assess AAA's administrative fees and expenses and compensation of the arbitrator[s] in the Award. In that regard, the arbitrator[s] may apportion such fees, expenses and compensation among the parties in such amounts as the arbitrator[s] determines to be appropriate. The arbitrator[s] may also assess interest at a rate and from such date as the arbitrator[s] deems appropriate and make an Award of attorney fees if a party has requested such an Award or it is authorized by law or the arbitration agreement. Similarly, JAMS' Rule 24(f) vests the arbitrator[s] with authority to allocate the arbitration fees and arbitrator's compensation and expenses unless the allocation is expressly prohibited by the parties' agreement. Moreover, JAMS' Rule 24(g) permits the arbitrator to allocate attorney fees and expenses and interest (at such rate and from such date as the arbitrator[s] deems appropriate if provided by the parties' agreement or allowed by applicable law

F. Sanctions

AAA Rule R-60 and JAMS Rule 29 both permit the arbitrator[s] to award sanctions for a party's failure to comply with its obligations under the Rules or with an order of the arbitrator. However, AAA Rule R-60 prohibits the arbitrator[s] from entering a default award as a sanction. JAMS' Rule 29 specifically provides that sanctions may include assessment of arbitration fees and arbitrator compensation and expenses, assessment of any other costs occasioned by the actionable conduct (including reasonable

attorneys' fees, exclusion of certain evidence or, in extreme cases, determining an issue submitted to arbitration adversely to the party that has failed to comply).

G. Consent Award

AAA's and JAMS' Rules both allow the arbitrator, upon the request of the parties, to issue a Consent Award in the event the parties settle the matter at some point during the arbitration process (AAA Rule R-49; JAMS Rule 28(c)). AAA Rule R-49 explicitly requires the Consent Award to include allocation of AAA's administrative fees and expenses as well as the arbitrator's fees and expenses.

IV. AVAILABLE ARBITRATION PROCEDURES

A. Document Submission Only

1. AAA's Rules

Cases involving no more than two parties and claims or counterclaims less than \$100,000 (exclusive of interest, attorney's fees and arbitration fees and costs) are governed by AAA's Fast Track Procedures (AAA Rules R-1(b); F-1). However, for cases where no party's claim exceeds \$25,000 (exclusive of interest, attorney's fees and arbitration costs) the dispute shall be resolved by submission of documents only unless any party requests an oral Hearing or the arbitrator determines that one is necessary (AAA Rule F-1). However, in any case, regardless of the amount in controversy, the parties may waive in-person Hearings and resolve the dispute through submission of documents to one arbitrator (AAA Rules R-1; D-1), in which case AAA's Procedures for Resolution of Disputes through Document Submission apply. In this instance, within 14 days of the arbitrator's appointment, the arbitrator is required to convene a preliminary management Hearing (via conference call) to establish a fair and equitable procedure for the submission of documents (AAA Rule D-2). The Hearing is then deemed to be closed upon the parties' submission of written documents. The arbitrator is then required to render the Award within 14 days from the date the Hearing is closed (AAA Rule D-4(b)).

2. JAMS Rule

JAMS Rule 23 permits the parties to waive the oral Hearing and submit the dispute to the arbitrator based on written submissions and other evidence as the parties may agree, regardless of the amount in controversy.

B. Fast Track/Expedited Procedures

1. AAA's Rules

One again, as a general rule, AAA's Fast Track Procedures apply to two-party cases where no party's claim or counterclaim exceeds \$100,000 (AAA Rules R-1(b); F-1). However, the parties can agree to use the Fast Track Procedures for larger cases, including Large Complex Construction Disputes (AAA Rules R-1(b)(d)). AAA's Fast Track Procedures provide for the expedited appointment of a single arbitrator (AAA Rule F-5). The arbitrator is then required to conduct a preliminary telephone conference within 10 days of his or her appointment (AAA Rule F-7(a)) to reach agreement with the parties on the exchange of discovery and timing of the Hearing. However, no discovery is permitted except the exchange of written documents (AAA Rule F-9) and, absent a showing of good cause, the Hearing shall not exceed one day (AAA Rule F-11). The Hearing shall be closed no more than 45 days after the preliminary telephone

conference (AAA Rule F-12) and the Award shall be rendered no later than 14 days from the date the Hearing was closed (AAA Rule F-13).

2. JAMS' Rules

JAMS' Rule 16.2 governs Expedited Procedures for arbitrations. According to JAMS' Expedited Procedures, the scope of requested written discovery is limited (JAMS Rule 16.2(b)). Also, each side is limited to one discovery deposition unless the arbitrator determines that more depositions are warranted based on all relevant circumstances (JAMES Rule 16.2(c)(v)(i)). The arbitrator is required to set a discovery cut-off not to exceed 75 days after the preliminary conference and 105 days for expert discovery (if any) (JAMS Rule 16.2(g)). Dispositive motions are not permitted (JAMS Rule 16.2(h)) and the hearing shall commence within 60 days after the discovery cut-off date (JAMS Rule 16.2(i)).

C. Regular Track Procedures

1. AAA's Regular Track Procedures

As a general rule, AAA's Regular Track Procedures apply to disputes where the claims or counterclaims of the parties range from \$100,000 to \$1,000,000, although the parties can agree to use the Regular Track Procedures for larger disputes (AAA Rule R-1). Unless the parties have agreed otherwise, Regular Track disputes are heard by a single arbitrator (AAA Rule R-18).

Before the appointment of the arbitrator, any party may request, or AAA in its discretion, may schedule, an Administrative Conference with the parties to discuss an efficient means of selecting the arbitrator, the parties' preferred arbitrator qualifications and address any other concerns including consolidation of related arbitrations or joinder of parties (AAA Rule R-11). Once the arbitrator is appointed, a Preliminary Management Hearing is held to discuss and establish a procedure for the arbitration appropriate to achieve a fair, efficient and economical resolution of the dispute (AAA Rule R-23). The arbitrator is vested with authority to manage the necessary exchange of information and documents amongst the parties and issue any orders necessary to enforce the same (AAA Rules R-24; R-25). Significantly, there is no automatic right to deposition discovery in a Regular Track Proceeding. However, the arbitrator does have the authority to issue third party records subpoenas in addition to ordering a site inspection or other necessary investigation (AAA Rules R-35(b) and R-37).

The arbitrator also has broad discretion in deciding how evidence is presented at the Hearing including allowing evidence to be presented by alternative means including video conferencing, internet communications, telephone conferences and means other than in-person testimony as long as all parties are afforded the full opportunity to present any evidence the arbitrator deems material and an opportunity for cross-examination is provided (AAA Rule R-33). In fact, an arbitrator may receive and consider evidence by declaration or affidavit although it is given such weight as the arbitrator deems it to be entitled (AAA Rule R-36(a)). Conformity to the legal rules of evidence is not necessary and the arbitrator has broad discretion to determine the admissibility, relevance and materiality of the evidence offered and may reject evidence deemed to be cumulative, unreliable or unnecessary (AAA Rules R-35(a)(b)). The arbitrator also is authorized to subpoena witnesses to appear at the Hearing (AAA Rule R-35(d)). At the arbitrator's discretion, the Hearing is deemed to be closed upon completion of the testimony at the Hearing or upon submission of post-Hearing briefs (AAA Rule R-40). The Award is then due no later than 30 days after the Hearing is closed. Within 20 days after the Award is issued, a party may request that the arbitrator correct any clerical, typographical, technical or computational errors in the Award but the arbitrator is not authorized to redetermine the merits of any claim already decided (AAA Rule R-51).

2. JAMS Regular Track Procedures

Under JAMS' Rules, the parties are required to voluntarily and informally exchange all non-privileged documents relevant to the dispute or claim immediately after the commencement of the arbitration and the names of individuals whom they may call as witnesses (JAMS Rule 17(a)). Each party is entitled to take one deposition of an opposing party unless the arbitrator determines that additional depositions are necessary (JAMS Rule 17(b)). Moreover, the obligation to voluntarily and informally exchange relevant documents is ongoing as new documents or information becomes available (JAMS Rule 17(c)). At least 14 days before the Hearing, the parties are required to serve and exchange witness lists (including experts) and a short description of the anticipated testimony of each witness, exhibits lists, and any written expert reports that may be introduced at the Hearing (JAMS Rule 20(a)). The arbitrator may also require each party to submit a pre-Hearing brief at least 7 days before the Hearing (JAMS Rule 20(b)). At the request of a party, all other parties are required to produce for the Hearing all specified witnesses under their control without the need of a subpoena. The arbitrator also may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing (JAMS Rule 21).

The arbitrator also has broad discretion concerning the presentation of evidence at the Hearing. Although inapplicable, the arbitrator may be guided by principals contained in the Federal Rules of Evidence although the arbitrator may limit testimony to exclude evidence that is immaterial, irrelevant, or cumulative (JAMS Rule 22(d)). Testimony can be presented in-person, telephonically or video graphically with the agreement of the parties or discretion of the arbitrator and the arbitrator is required to receive and consider deposition testimony recorded by transcript or videotape provided that the other parties had the opportunity to attend and cross examine the witness. Finally, the arbitrator has discretion to consider witness affidavits or other recorded testimony (even if the other parties have not had the opportunity to cross examine the witness) but will give that evidence only such weight as he or she deems appropriate (JAMS Rules 22(e)(g)). The arbitrator declares the Hearing closed when he or she determines that all relevant and material evidence and arguments have been presented although the arbitrator may defer closing the Hearing until a date determined by the arbitrator in order to permit the parties to submit post-Hearing briefs (JAMS Rule 22(h)). The arbitrator's Award is then due within 30 days after the date the Hearing is closed (JAMS Rule 24(a)). Within seven days after the final Award is issued, a party may request that the arbitrator correct any computational, typographical or other similar error in the Award (JAMS Rule 24(j)). Proceedings to enforce, confirm, modify or vacate an Award are then controlled/conducted according to the Federal Arbitration Act or applicable state law (JAMS Rule 25).

Significantly, JAMS have an Optional Arbitration Appeal Procedure to address the limited appeal rights typically associated with the binding arbitration process. These procedures provide for an appointment of a three-member panel (unless the parties otherwise agree on a single panel member) followed by written appellate briefs. Oral arguments are also scheduled upon request of the parties or the initiative of the arbitration panel.

D. Large Complex Construction Disputes

AAA has separate procedures for Large Complex Constructions Disputes for claims in excess of \$1,000,000 exclusive of interest, attorneys' fees, arbitration fees and costs. Under these Rules, AAA is required to conduct an Administrative Conference with the parties and counsel within 14 days after the administrative filing requirements have been met to discuss, among other thing, the nature and magnitude of the dispute and anticipated length of Hearing, technical and other qualifications of the arbitrators, consolidation of related arbitrations, means and methods for cost-effective case management and any other items that may facilitate the management of a complex arbitration (AAA Rule L-2). Absent agreement by

the parties otherwise, a panel of three arbitrators from AAA's Large Complex Construction Case Panel is appointed to hear the case (AAA Rule L-3). Once appointed, the panel is required to hold a Preliminary Management Hearing to discuss and schedule all relevant matters concerning discovery and the Hearing including the scope and timing of written discovery exchanged between the parties, necessary third-party records, timing and duration of the Hearing, dispositive issues and any other matters necessary to achieve a just, efficient and cost-effective resolution of the case. In exceptional cases, at the discretion of the arbitrator and upon a showing of good cause, the arbitrator may order depositions determined to be relevant and material to the outcome of the case (AAA Rule L-4). Otherwise, all Regular Track Procedures apply.

E. Fixed Time and Cost Arbitrations

AAA also has Supplementary Rules for fixed time and cost arbitrations. The time to complete the arbitration, number of Hearing days and AAA fees and arbitrator compensation is calculated according to a time/cost schedule based on the amount of the claim or counterclaim in controversy. Within three days of the filing of the Demand for Arbitration, an Administrative Conference is held between AAA and parties to expedite the arbitration, explore administrative details, establish an efficient means for selecting an arbitrator and ascertaining the parties' preferred arbitrator qualifications (AAA Rule SR-9). Within 14 days of the Administrative Conference, the parties and representatives are required to hold a Meet and Confer Conference (in-person, by telephone or by videoconference) to discuss and agree upon the process for selecting the arbitrator; time, date and place of the Hearing; number of Hearing days and allocation of days to each party; and necessary document exchange and discovery including the extent to which depositions shall be permitted (AAA Rule SR-11).

Unless the parties agree otherwise, there is a single arbitrator regardless of the amount in controversy. The maximum days from filing to Award ranges from 120 days to disputes ranging from \$75,000-\$250,000 to 360 days for disputes above \$1,000,000. AAA's fees range from \$2,500 for disputes ranging from \$75,000-\$250,000 to \$10,000 for disputes above \$1,000,000. The maximum number of Hearing days ranges from three for disputes ranging from \$75,000- \$250,000 to ten days for disputes above \$1,000,000. The maximum total fees for the arbitrator range from \$10,500 for disputes ranging from \$75,000-\$250,000 to \$52,000 for claims in excess of \$1,000,000.

V. PROS AND CONS OF BINDING ARBITRATION

A. Speed/Efficiency

One of the obvious advantages to binding arbitration is speed and efficiency. As noted above, depending on the size and complexity of the matter and amount in controversy. An arbitration Award can be obtained in as little as 45 days for Fast Track Cases and 1 year for Large, Complex Construction Disputes. This pales in comparison to the time it takes to get to trial in state or federal court. As is well known in the insurance industry, the longer a file lingers, the more expensive it will be in terms of defense fees and expenses. The potential downside is that, unless the discovery process is efficient and streamlined, the parties run the risk in arbitration of not getting discovery necessary to properly evaluate their respective claims and defenses and adequately prepare for the arbitration Hearing.

B. Predictability/Reliability

Another obvious advantage to binding arbitration is predictability and reliability with respect to the arbitration Award. Specifically, because the arbitrator has a degree of sophistication, knowledge and understanding of design and construction issues not possessed by a judge or jury, the arbitrator is better

able to understand the complex and technical issues associated with the underlying claims and defenses, leading to a more predictable and reliable outcome.

C. Discovery/Arbitration Preparation

Discovery in an arbitration proceeding is more limited, especially as it relates to depositions of fact and expert witnesses, for which there is no automatic right. On the positive side, this can prevent discovery abuses since the arbitrator has broad discretion to regulate the discovery process. Further, this can make the discovery process more streamlined and efficient, resulting in significantly lower attorney fees and litigation expenses. On the downside, if the arbitrator does not permit the parties to conduct sufficient discovery (especially the need to take necessary depositions), this can impair the parties' ability to fully evaluate and appreciate the risks associated with the claims and defenses and/or provide accurate and adequate advice to their clients.

D. Privacy

Unlike litigation in state or federal court, a binding arbitration is a private proceeding, allowing the parties to avoid the stigma, embarrassment or negative connotation that often accompanies the litigation process.

E. Expense

A binding arbitration can be more or less expensive compared to state or federal court litigation depending on the circumstances of the particular case. On the one hand, additional costs associated with the arbitration process include fees and expenses associated with the arbitrator and entity administering the arbitration. On the other hand, because the file tenure is typically far shorter and the discovery process more streamlined, costs associated with discovery and preparation for the arbitration Hearing are typically far less than what they would be in state or federal court. Additionally, arbitrations tend to be less involved in terms of motion practice, also cutting down on fees and expenses.

F. Appeals

With the exception of JAMS' Optional Appeal Procedures, there is no ability to appeal an arbitration Award on its merits. This can be a factor in situations where the arbitrator's decision on the merits is more dependent upon legal issues as opposed to the factual circumstances giving rise to the claim. This is positive for the party that may be the beneficiary of an erroneous decision and negative for the party that that did not.

G. Evidence

Because the rules of evidence do not apply in an arbitration Hearing, the presentation of evidence at the Hearing can become a "free for all" unless the arbitrator is assertive enough to rein the parties in during the process. On the other hand, the ability to present testimony by alternative means (i.e., telephone or videoconference) can often improve the flow of the Hearing and avoid the logistical issues that often accompany in-person testimony, in addition to reducing the costs of having a witness appear live.

VI. PRACTICE POINTERS

As an advocate/party subject to the binding arbitration process, there are a number of measures that can be undertaken to make the arbitration process work in your favor, avoid prejudice and make the process as efficient and cost-effective as possible. These include, 1) including appropriate provisions in the arbitration

agreement regarding, among other things, locale, choice of law, consolidation of related arbitrations, joinder of necessary parties, permitted discovery, allocation of attorney fees and arbitration fees and expenses, 2) conferring with opposing counsel before the initial conference with the arbitrator to reach a consensus regarding the scope and extent of permitted discovery (including depositions), discovery schedule and timing of the Hearing, interim issues to be addressed by the arbitrator, process for the selection of the arbitrator, presentation of evidence at the Hearing and potential dispositive issues, and 3) working with opposing counsel to streamline the discovery process and avoid unnecessary litigation fees and expenses.

VII. CLAIMS HANDLING SUGGESTIONS

A. Policy Information

Any coverage issues or concerns should be raised and communicated to the client and counsel so that everyone is on the same page. For the claims handler, key policy information such as limits, deductible, policy year of coverage and exclusions should be clearly communicated to the policyholder and counsel so they know what's in play, as coverage can change from year to year and people forget. The client may have forgotten their limits or deductible changed from one year to the next. If the policy has eroding limits it's also critical for the adjuster to communicate and identify any policy erosion and continue to update the erosion throughout the life of the claim.

B. Reporting Requirements

Reporting requirements such as case evaluations and pre-arbitration reports should be communicated by the adjuster to counsel, and counsel should submit a thorough and timely assessment. Counsel sometimes operate under the assumption that such reports are submitted for purposes of checking a box or merely satisfying a guideline requirement. However, they are key tools for the adjuster and client to determine whether a matter should actually proceed to arbitration or whether it presents too much risk and should be settled.

C. Involving the Policyholder/Client & Carrier in the Decision Making

The arbitration date and any continuances should be clearly communicated to the adjuster and client, and a planning or strategy call should be held well in advance of the arbitration date. Counsel cannot assume they have authority to proceed to arbitration just because an arbitration date has been communicated. It should be a collective decision between counsel, the adjuster and the client.

D. Expectations During Arbitration

A client representative should attend the arbitration with counsel. Counsel should provide a daily written, high-level recap of each day's events, and should identify the key testimony and rulings and whether they had any impact (positive or negative) on counsel's pre-arbitration evaluation so that all parties (adjuster, client and counsel) can decide whether to continue on or try to settle.

E. Post-Mortem/What Happens After

Counsel should submit a post-mortem report identifying what went right and what went wrong, including any recommendations for settlement if there was an adverse verdict.