**Stuart Esner**
ESNER, CHANG, BOYER AND MURPHY

# Don't leave money on the table

## RECOVERING ATTORNEY FEES AND COSTS AT ARBITRATION

"California follows 'the American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees.'" (*Trope v. Katz* (1995) 11 Cal.4th 274, 278, 45.) This rule applies unless the recovery of attorney fees is "specifically provided for by statute" or the parties have agreed upon "the measure and mode of compensation of attorneys. (§ 1021.)" (*Wash v. Banda-Wash* (2025) 108 Cal.App.5th 561, 567.) But even if there is a statute or contract that authorizes attorney's fees incurred in the prosecution of an "action," does that necessarily authorize an award of fee when the claims have been litigated in arbitration rather than a court action?

### Contractual-fee agreement

With respect to recovery based on a contractual-fee provision, the answer is clearly "yes." "Where a contract provides for attorney fees to the prevailing party in a suit or action brought upon the contract, the provision has been held applicable to attorney fees incurred in arbitration proceedings. 'It has been established that a contract provision for recovery of attorney's fees if a party is required to 'bring suit' is broad enough to include fees arising in arbitration proceedings.'" (*Villinger/Nicholls Development Co. v. Meleyco* (1995) 31 Cal.App.4th 321, 328.) "Where the contract requires arbitration to settle disputes and provides attorney fees for the prevailing party, limiting attorney fees to those incurred in traditional court actions would render the clause meaningless." (*Ibid*.)

### Statutory fees

Whether this same reasoning applies to a statute allowing fees for the prosecution of an action is not as straightforward. In the California Practice Guide to Alternative Dispute Resolution, *Villinger/Nicholls, supra,* is cited as standing for the principle that "[s]tatutes authorizing fee awards 'in any action' refer to court proceedings, not arbitration. Arbitrators cannot utilize such statutes to award fees where the contract sued upon contains no attorney fees provision." (I. Arbitrator's Award, Cal. Prac. Guide Alt. Disp. Res. Ch. 5-I, par. 5:431.9.)

However, and with respect to the practice guide, which is very good on the topic of arbitrations generally, this passage is questionable. In *Villinger/Nicholls* (cited by the practice guide) the court concluded that, even though a *contractual fee* provision allowing fees for the prosecution of an "action" was broad enough to allow recovery of fees during an arbitration, a *statutory fee* provision that authorizes fees in an "action" did not allow recovery of fees incurred seeking to confirm an award.

The Court was there interpreting former Civil Code section 3176, which provided that fees were available "'[i]n any action against an owner or construction lender to enforce payment of a claim stated in a bonded stop notice. . .'" (*Id* at p. 326.) The court explained "[a] statute is not a contract and thus no such consideration requires a broad reading of the term 'action' in [former] Civil Code section 3176. Arbitration proceedings are not the mandatory method of dispute resolution in all construction contracts. The Legislature need not have intended an 'action' to include arbitration proceedings or special proceedings to confirm or vacate awards to give the attorney fees provision in Civil Code section 3176 meaning." (*Id* at p. 328.)

While the language used by the court was broad, the issue considered there was actually very narrow. The court held that a petition to confirm an arbitration award was not an "action" but rather a special proceeding, as defined in section 22 of the Code of Civil Procedure. (*Id* at p. 327.) The court did not have cause to consider whether fees could have been awarded in the arbitration itself, as that issue was not involved in the appeal. Thus, to the extent the language from that opinion can be considered to apply to fees incurred in the arbitration, its dicta.

In any event, to the extent *Villinger/Nicholls* can be read as authority for the proposition that, when a statute allows fees for the prosecution of an "action," then fees incurred in an arbitration would not be recoverable, it is of questionable validity. In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 103, the Supreme Court made clear that, when parties agreed to submit a statutory claim to arbitration, they are entitled to seek recovery of all remedies allowed by that statute, including attorney fees.

The Court explains: "The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed. We suggested as much in *Broughton* when we held that an agreement to arbitrate a statutory claim implicitly incorporates the substantive and remedial provisions of the statute so that parties to the arbitration would be able to vindicate their statutory cause of action in the arbitral forum. (*Broughton, supra*, 21 Cal.4th at p. 1087.)

Similarly, in *Graham Oil v. ARCO Products Co.* (9th Cir. 1995) 43 F.3d 1244 (*Graham Oil*), the court refused to enforce an arbitration agreement between a petroleum franchiser and franchisee that did not allow for the punitive damages and attorney fees remedies available under the Petroleum Marketing Practices Act, because both remedies are 'important to the effectuation of the PMPA's policies. (*Graham Oil, supra*, 43 F.3d at p. 1248.)' (*Ibid*., internal quotation marks omitted; see *Bickel v. Sunrise Assisted Living* (2012) 206 Cal.App.4th 1, 12 ["section 15657, part of the Elder Abuse Act, including its provision for recovery of attorney fees and costs, was designed to accomplish an important public purpose. Therefore, the rights established in section 15657 were unwaivable and, as a result, the arbitration agreement in the instant case could not be used as a vehicle for the waiver of such important statutory rights. [Citation.]"].)

The above referenced California Practice Guide to Alternative Dispute Resolution references these authorities as standing for the more limited principle that "Courts may interpret an agreement to arbitrate a claim under a statute that mandates a fee award to the prevailing party as including the issue of attorney fees." (California Practice Guide to Alternative Dispute Resolution, Arbitrator's Award, Cal. Prac. Guide Alt. Disp. Res. Ch. 5-I, par 5:431.15.) However, these cases are broader and preclude denial of fees authorized by statute just because the parties agreed to arbitrate their statutory claims. The bottom line is that there are strong arguments that when a contract or statute entitle recovery of attorney's fees incurred in prosecuting an "action," then those fees are recoverable when the claims are litigated during arbitration.

Before leaving this issue it's noteworthy that, even absent a statute or a contract containing a fee provision, the practice guide explains that "[s]ome provider rules (e.g., AAA rules) authorize the arbitrator(s) to award attorney fees if all parties make a request. It is common for the initiating party to request fees in its statement of claim even when there is no contractual or statutory basis for a fee award. In that circumstance, if the responding party similarly requests a fee award, the provider rules arguably would permit the arbitrator(s) to award fees to the prevailing party." (I. Arbitrator's Award, Cal. Prac. Guide Alt. Disp. Res. Ch. 5-I, par 5:431.7.) Accordingly, be careful about what you request in your arbitration papers to avoid potentially empowering an arbitrator to award fees against your client, which award would be subject to only very restrictive review by the Superior Court.

Finally, it should also be kept in mind that, even if there is an agreement allowing fees, a statute might nevertheless preclude such an award. For instance, FEHA precludes imposition of fees or costs against a plaintiff unless it is first determined "the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." (Gov. Code, § 12965, subd. (c)(6).)

If you are entitled to fees, the next question is whether those fees should (or must) be first sought during the arbitration.

## Requesting the arbitrator to award attorney fees

If you are entitled to fees, it is critical to determine whether any award must be sought during the arbitration. This depends on the terms of the parties' agreement to arbitrate. If the agreement empowers the arbitrator to award fees, then any request must be made during the arbitration or they are waived. On the other hand, if the parties agreed that the arbitrator lacked the power to award fees, then the request could be deferred to proceedings in the superior court following the arbitration. If it is the arbitrator that makes the fee award, then the limited judicial review that applies to arbitration awards generally would also apply to the fee award. If it is the superior court that makes the award, then the award would be subject to the broader appellate review applicable to any other fee award.

This straightforward issue, however, is not so straightforward. Courts addressing this issue emphasize that "the parties to a private arbitration [need not] specify every detail, characteristic and consequence of the proceeding they contemplate." (*Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 705.) Under this principle, if the parties' agreement does "not limit the issues to be resolved through arbitration, the issue of [a party's] entitlement to ... costs, as requested in his complaint, [is] subject to determination in arbitration proceedings." (*Corona v. Amherst Partners* (2003) 107 Cal. App.4th 701, 706 ; *Storm v. Standard Fire Ins. Co.* (2020) 52 Cal.App.5th 636, 646–648. [same])

***The arbitration agreement controls***

When an arbitration is by way of agreement of the parties, the test is whether the agreement to arbitrate a dispute expressly removes the award of fees from the scope of the arbitration. If it doesn't, then it is presumed that the issue is for the arbitrator to resolve. This same analysis applies to statutory uninsured motorist arbitrations. (*Storm v. Standard Fire Ins. Co.* (2020) 52 Cal.App.5th 636, 643–644 ["Because underinsured motorist arbitrations are contractual in nature, the parties to an underinsured motorist insurance agreement may contract for their own division of arbitration costs consistent with the California Arbitration Act (CAA) (§ 1281 et seq.)"].)

***When no request for attorney fees is made***

If the arbitrator has the authority to award fees but no request is made during the arbitration, then the issue is deemed waived. As explained in *Maaso v. Signer* (2012) 203 Cal.App.4th 362, 377: "Because the submission was not limited, it included the issue of costs and interest and, where available, attorney fees. (See *Corona v. Amherst Partners* (2003) 107 Cal.App.4th 701, 706.) [Par] In *Corona* the prevailing party in a contractual arbitration sought attorney fees and costs incurred in the arbitration from the superior court without having first sought them from the arbitrator. In affirming the trial court's denial of such costs, the reviewing court noted that because the parties' stipulation did not limit the issues to be resolved through arbitration, the issue of entitlement to attorney fees and costs was subject to determination in the arbitration proceedings. (*Corona v. Amherst Partners, supra,* 107 Cal.App.4th at p. 706.)"

***Requesting attorney fees before issuance of an award***

Accordingly, be careful to make a request for fees before the arbitrator issues a final decision that is no longer subject to correction. "Once the 30-day period for correction under section 1284 runs, the award is final and the arbitrator's jurisdiction ends. (*Lonky v. Patel* (2020) 51 Cal.App.5th 831, 843. . . ['issuance of an "award" is what passes the torch of jurisdiction from the arbitrator to the trial court"].) At this point, any party 'may petition the court to confirm, correct or vacate the [arbitration] award.' (§ 1285.) The trial court then assumes jurisdiction to act. (§ 1286.)" (*Taska v. RealReal, Inc.* (2022) 85 Cal.App.5th 1, 8.) The issue becomes whether the arbitrator intended the award to finally resolve all issues, including fees and costs.

There is presently uncertainty as to what happens when the arbitrator is requested to address the issue of fees but mistakenly fails to do so in the award. In *A.M. Classic Const., Inc. v. Tri-Build Devel-*

*opment Co.* (1999) 70 Cal.App.4th 1470, 1478, the Court explained: "California's contractual arbitration law permits arbitrators to issue an amended award to resolve an issue omitted from the original award through the mistake, inadvertence, or excusable neglect of the arbitrator if the amendment is made before judicial confirmation of the original award, is not inconsistent with other findings on the merits of the controversy, and does not cause demonstrable prejudice to the legitimate interests of any party."

However, as reflected by the thoughtful *unpublished* decision in *Little v. Regents of the University of California* (Cal. Ct. App., Apr. 2, 2025, No. 2D CIV. B334021) 2025 WL 984433, at *3, it is risky to rely on the power of the arbitrator to correct an award under this analysis. (Of course, unpublished decisions cannot be cited as precedent in court. (Cal. Rules of Court rule 8.115).) There, the Court discussed two lines of cases. First, it referenced cases such as *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg* (2001) 86 Cal.App.4th 865, 881, which concluded that the time to amend or modify an arbitration award was limited to the time specified in Code of Civil Procedure section 1284 (or by arbitration rules agreed on by the parties. (*Id.* at p. 881, fn. 25.) Under section 1284 the parties' request must be made within 10 days and the *correction* must be within 30 days of the signed award.

The *Little* Court then referenced a second line of cases exemplified by *Delany v. Dahl* (2002) 99 Cal.App.4th 647 where the Court disagreed with the time limitation in *Century City* and agreed with *A.M. Classic*. In *Little*, the Court reasoned that "the better rule is that modification may be made at any time before judicial confirmation of the arbitrator award. Here Little requested modification and the arbitrator responded prior to judicial confirmation of the award. Thus, the modification was timely. The modification was consistent with the findings of the arbitrator, and did not prejudice the legitimate interests of the Regents. The Regents agreed that the arbitrator shall specify a remedy. They have no legitimate interest in an award without a specification of a remedy." (2025 WL 984433, at *3.)

In view of this uncertainty, the most prudent course is that, if an arbitration award fails to award fees even though it was a matter for the arbitrator to decide, and you are *not* absolutely certain that the award is intended as an interim (and not as a final) decision, then make a request for them or for correction of the award under the time provided in section 1284.

***When the Superior Court has jurisdiction to award attorney fees***

Finally, even in those cases where the arbitrator has the exclusive power to award fees for the work performed during the arbitration, the Superior Court still retains the jurisdiction to award fees (and costs) incurred in connection with proceedings seeking to compel arbitration or to confirm or vacate the award. (See *Acosta v. Kerrigan* (2007) 150 Cal.App.4th 1124, 1132 [fees awarded in connection with a petition to compel arbitration]; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 Cal.App.4th 508, 513 [post arbitration fees can be awarded by the Superior Court even if the arbitrator had denied fees in connection with the arbitration].)

## Recovering Code of Civil Procedure section 998 costs during arbitration

The issue relating to requests for extraordinary costs under Code of Civil Procedure section 998 is analyzed similarly to a request for fees. Section 998 establishes a procedure for shifting costs if the prevailing party obtains a judgment less favorable than a settlement offer previously served by the other party. (Code Civ. Proc., § 998, subds. (a)-(d); *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 798.) In that situation, the prevailing party is precluded from recovering its postoffer costs and must pay its opponent's postoffer costs, including expert witness fees. (*Ibid*.) Section 998 expressly applies to contractual arbitrations (§ 1280 et seq.) and medical malpractice arbitrations (§ 1295 et seq.).

Courts have concluded that section 998 applies beyond this context if the purpose of that statute is satisfied. (See *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 Cal.4th 133, 142 ["We ... conclude that an uninsured motorist arbitration pursuant to Insurance Code section 11580.2 is an 'arbitration' within the meaning of Code of Civil Procedure section 998 and subject to the latter statute's cost-shifting provisions"]; *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 1000 ["Having concluded Civil Code section 1794(d) [(the Song-Beverly Act)] fails to set forth an express exception to the general cost-recovery rule set forth section 1032(b), we likewise conclude it provides no exception to the provisions of section 998. Section 998 explicitly states that it 'augment[s]' section 1032(b). Thus, the requirements for recovery of costs and fees under section 998 must be read in conjunction with section 1032(b), including the requirement that section 998 costs and fees are available to the prevailing party "[e]xcept as otherwise *expressly* provided by statute." (§ 1032(b), italics added.)[Fn] Because the cost-shifting provisions of the Song–Beverly Act do not 'expressly' disable a prevailing defendant from recovering section 998 costs and fees in general, or expert witness fees in particular, we find nothing in the Act prohibiting the trial court's exercise of discretion to award expert witness fees to seller under the circumstances of this case"].)

***How to request section 998 costs from the arbitrator***

As to how to make a request, the Court in *Heimlich v. Shivji* (2019) 7 Cal.5th 350, 356, explained: "We hold a request for costs under section 998 is timely if filed with the arbitrator within 15 days of a final award. In response to such a request, an arbitrator has authority to award costs to the offering party. However, if an arbitrator refuses to award costs, judicial review is limited." Thus, unless there is an express limitation on the power to award costs, the request must be made in the arbitration or it is lost.

In *Maaso v. Signer* (2012) 203 Cal. App.4th 362, the plaintiff filed a petition to confirm an arbitration award in his favor and in that petition also sought to recover costs incurred in the arbitration under section 998. (*Id.* at p. 369.) The plaintiff "did not request that the arbitrators rule on the issue of section 998 costs or seek to present evidence on the issue" during the arbitration. (*Ibid.*) The trial court granted the petition to confirm the arbitration award, but denied the plaintiff's claim for costs and prejudgment interest. (*Ibid.*) The *Maaso* court affirmed, concluding "that [the plaintiff] was not entitled to these costs and interest because he never requested these enhancements from the arbitrators." (*Id.* at p. 377.) Because the issues submitted to arbitration were not limited, they "included the issue of costs and interest and, where available, attorney fees." (*Ibid.*)

***When a court has power to award section 998 costs***

When the arbitrator's powers are expressly limited to not include an award of costs, the request can be timely made in connection with a petition to conform the award in the Superior Court. (*Storm v. Standard Fire Ins. Co.* (2020) 52 Cal. App.5th 636, 648 [In the context of an uninsured motorist arbitration, "the arbitrator's powers were expressly limited, and did not give the authority to rule on Storm's requests for arbitration costs under section 998. Hence, Storm was not required to request those costs from the arbitrator, and the proper forum to hear her request is the trial court that confirmed the arbitration award"].)

## Conclusion

In sum, this article is intended to provide a brief overview of several issues regarding fees and costs in matters that have been submitted to arbitration. It is not intended to be an exhaustive discussion on the issue. The key takeaway from this article is to be careful so you don't find yourself leaving money on the table!

*Stuart B. Esner is certified as an appellate specialist. He graduated magna cum laude from Loyola Law School of Los Angeles and then worked as a law clerk for the Honorable John L. Cole in the writs and receivers department of the Los Angeles Superior Court, and for more than four years as a research attorney for Associate Justice Eugene McClosky at the Second Appellate District Court of Appeal, Division Four. In 1990, Mr. Esner co-founded the appellate firm now known as* Esner, Chang, Boyer and Murphy. *The firm specializes in representing plaintiffs in appellate litigation and related trial court work. Mr. Esner can be reached at sesner@ecbm.law*