I. Introduction
II. Arbitration
   A. Overview
   B. Brief History of Arbitration in the Insurance Context
      1. Reinsurance Arbitration
      2. Bermuda Form Arbitrations
   C. Advantages of Arbitration in Insurance Claim Disputes
   D. Arbitration Law and Procedure
      1. Federal Arbitration Act, Preemption, and the McCarran-Ferguson Act
      2. Discovery
      3. Hearings
      4. Awards
         a. Enforcement of and Challenges to Awards
   E. Drafting Arbitration Agreements
      1. Scope
      2. Forum, Governing Law, and Rules
      3. Arbitrators: Number, Type, and Selection
      4. Consolidation and Confidentiality
      5. Form of Award
III. Appraisal
   A. Overview
   B. Advantages of Appraisal
   C. Appraisal Provisions
   D. Ripeness and Procedure
      1. Ripeness
      2. Selecting Appraisers and Umpires
This chapter examines the ways in which binding alternative dispute resolution (binding ADR) is used to resolve insurance claim disputes. ADR encompasses various mechanisms and processes that can be used in place of litigation, including mediation, arbitration, and appraisal, as well as combinations of different forms of ADR, such as med-arb. Most often, mediation and/or arbitration are used to resolve insurance coverage disputes while appraisal is used to settle disagreements about the measure of damage or the amount of the insured loss. This chapter focuses on the two most common binding processes—arbitration and appraisal.

Binding ADR can be an attractive alternative to court litigation for resolving insurance claim disputes. As a general matter, court litigation is often protracted and expensive, and the results are uncertain. In a binding ADR setting, the parties can select arbitrators and appraisers who have expertise in insurance law or property valuation—expertise, or even experience, that a judge or a jury may not have. Given a choice between court litigation and arbitration or appraisal, insurers and insureds

---

1. As will be described in greater detail infra, each ADR procedure is flexible, and thus these categories—mediation, arbitration, and appraisal—are meant to be read broadly to encompass a number of different processes.

2. Generally, med-arb involves a process where parties agree to mediate their disputes and, if unable to settle, to participate in binding arbitration using the same neutral.

3. It should be noted that states have broad authority to regulate the insurance industry. Under that authority some states have prohibited the use of arbitration agreements in insurance contracts; and several states have required prelitigation mediation, at least where a party requests, to resolve certain insurance disputes. In addition, arbitration is also mandated by statute—even in the absence of prior agreement—for certain auto insurance claims, counsel fee disputes, and workers’ compensation claims.

4. In addition, and increasingly, ADR may include government-created dispute resolution programs developed after natural disasters. See generally Robert H. Jerry II, Dispute Resolution, Insurance, and Points of Convergence, 2015 J. Disp. Resol. 255, 260–71 (2015); see id. at 263–64 (describing the program created to deal with the more than 600,000 insurance claims after Hurricane Andrew struck the Florida coast south of Miami in 1992: “What emerged in November 1992 was an emergency rule titled ‘Alternative Procedures for Resolution of Disputed Claims from Hurricane Andrew.’ Under the program created by this rule, approximately 2,400 claims were filed and approximately 92 percent were resolved successfully through mediation.”). Finally, arbitration and mediation are frequently used to resolve healthcare disputes. See id. at 280–81.
alike may prefer the efficiency (in terms of both cost and time) of arbitration or appraisal. Further, typically insurers—although not necessarily policyholders—prefer the ability to select a panel that includes insurance-industry experts, the privacy of nonpublic proceedings, and the noncreation of precedent, even if the trade-off is not having the right to full appellate review.

Thus, binding ADR is frequently used in connection with domestic and international insurance, reinsurance, and broker disputes. The following sections describe arbitration and appraisal and the benefits of using these processes to resolve insurance claim disputes.

II. Arbitration

A. Overview

Arbitration has long been used as an alternative to court litigation. Arbitration involves an adjudication of the parties’ dispute—usually a binding one—by a single arbitrator or a tripartite panel of arbitrators. And, as compared to litigation, arbitration offers less formal procedures, which often reduce the amount of time and expense dedicated to resolving the parties’ dispute. It also offers an opportunity to handpick the decision maker and craft a tailor-made process that fits the parties’ expectations about how the dispute should be resolved. In addition, awards rendered by arbitrators are enforceable in court, but unlike litigation with its lengthy review and appeal processes, under the Federal Arbitration Act (FAA) and the arbitration acts of each state and the District of Columbia, arbitration awards are only subject to limited judicial review.

B. Brief History of Arbitration in the Insurance Context

While arbitration has been used in insurance disputes for hundreds of years,5 it has been used more frequently in certain areas than others. Historically, arbitration has been used in the insurance arena to resolve disputes among insurers in the reinsurance context6 and between insureds and insurers under high excess catastrophic liability policies. The latter have become known as “Bermuda Form” arbitrations.

5. New England Mut. Marine Ins. Co. v. Dunham, 78 U.S. 1, 31 (1870) (“[I]t is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it, were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A.D. 1601, when the statute of 43 Elizabeth was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance.”).

6. In a reinsurance contract, the initial insurer “cedes” risk to another insurer, who becomes the reinsurer (and, of course, the reinsurer could cede a portion of its risk to yet another reinsurer). Hence, disputes arise between insurers, rather than between an insurer and a non-insurer policyholder.
That said, arbitration is also now being used more frequently in many types of insurance disputes, including those involving coverage of first-party property and third-party claims. As explained by one commentator:

[A]rbitration is standard in many disputes involving the ISO Commercial General Liability policy [which is used by tens of millions of U.S. businesses] as well as in matters involving automobile insurance, crop insurance and various types of commercial insurance, including those relating to directors and officers (D&O), employment liability, cyber liability, and errors and omissions (E&O). Arbitration is also common in other types of insurance, including healthcare insurance.7

1. Reinsurance Arbitration

Reinsurance arbitrations are typically conducted by tripartite panels made up of two party-selected insurance-industry insiders—current or former insurance company executives who are usually independent, although not neutral—who choose a third arbitrator, either another insurance-industry insider or a professional arbitrator, to act as a neutral umpire. In the absence of agreement on the third arbitrator, most arbitration provisions require the administrator or a court with jurisdiction to pick the umpire.

As stated, the party-appointed arbitrators, while independent, are often non-neutral:

The arbitration clause used in . . . [reinsurance agreements] does not require all of the arbitrators to be neutral. The only time the word “neutral” is used is to describe the umpire. Thus it can allow party-appointed arbitrators to be partial to the side that appointed them and even serve as advocates for them. This leaves the dispute to be decided by the neutral umpire.

. . . .

Using party-appointed arbitrators who were not impartial did not violate the Code of Ethics for Arbitrators in Commercial Disputes adopted in 1977 by the American Bar Association and the American Arbitration Association, which acknowledged that these arbitrators need not be neutral. However, the Code required all arbitrators, even those who were partial party-appointed, to adhere to Canon 1, which stated that “[a]n arbitrator should uphold the integrity and fairness of the arbitration process.” It also opined that “non-neutral” arbitrators should not engage in delaying tactics or harassment of parties or witnesses.8

Under the revised American Arbitration Association/American Bar Association Code of Ethics (AAA/ABA Code), arbitrators are presumed to be neutral,

---

but the parties can specify that they want to use non-neutral arbitrators in their arbitration agreement, and this will be honored. However, neutrality is not the same as independence, which is a requirement that the arbitrator not have a financial or business interest in the parties. Independence is assumed, and typically required of arbitrators. Indeed the revised AAA/ABA Code continues to require both neutral and non-neutral arbitrators to be independent—that is, to (1) “uphold the integrity and fairness of the arbitration process” by, for example, accepting appointment only if they are able to serve impartially and independently from the parties, potential witnesses, and the other arbitrators; and (2) “make decisions in a just, independent, and deliberate manner” by, among other things, exercising independent judgment and not permitting outside pressure to affect decisions. 10

Historically, in the reinsurance context, “arbitrators [frequently have been] directed not to worry about technical legal principles but to attempt to fairly and even-handedly put the ceding company and the reinsurer in the positions they should occupy.” 11 In fact, the arbitration clause may contain an “honorable engagement provision” directing the arbitrators to treat the agreement as “an honorable engagement rather than merely a legal obligation” and stating that the arbitrators are “relieved of all judicial formalities and may abstain from following the strict rules of law.” 12 As one court explains, these clauses provide “a huge advantage” because “the prospects for successful arbitration are measurably enhanced if the arbitrators have flexibility to custom-tailor remedies to fit particular circumstances.” 13

2. Bermuda Form Arbitrations

Arbitration of disputes involving high excess catastrophic liability—such as mass tort liability—is also common, but these arbitrations are not likely to be held in the United States. Beginning in the mid-1980s, market conditions made it difficult to acquire affordable catastrophic liability coverage, in part because of unfavorable court rulings in U.S. courts. The insurance market responded by establishing two

9. See also JAMS Comprehensive Arbitration Rules & Procedures Rule 7(c) (“Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party, unless the Parties have agreed that they shall be non-neutral.”).

10. AAA/ABA Code, Canons I & V. Likewise, under Guideline X of JAMS Arbitrators Ethics Guidelines, “a non-neutral Arbitrator may be predisposed toward the Party who appointed him or her but in all other respects is obligated to act in good faith and with integrity and fairness.” Note also that many of the elements of arbitration provisions in reinsurance agreements that are described here, such as the use of non-neutral arbitrators, can also be found in arbitration clauses involving insurers and policyholders.

11. Jerry, Dispute Resolution, Insurance, and Points of Convergence, supra note 4, at 277 (internal quotation marks omitted).


13. Id.
new insurers, Ace Ltd. and XL Group P.L.C., both located in Bermuda and offering specialized policies—now commonly referred to as “Bermuda Form” policies.

Among other things, the Bermuda Form requires confidential arbitration, with New York law (as modified) governing substantive issues, and an arbitration held in London under the English Arbitration Act of 1996. Bermuda Form arbitrations are conducted with tripartite panels, with each side selecting a party-appointed arbitrator and the party-appointed arbitrators selecting a third arbitrator. Significantly, each arbitrator is neutral, which is the norm in London-based arbitration:

In the insurance sector, London-based arbitration is thought generally preferable to US arbitration, because of London’s tradition of neutrally composed tribunals and reasoned awards. By contrast, the non-neutral tradition of arbitration remains prevalent in US insurance disputes. In such arbitrations, a three-person tribunal will include two party “hired guns,” meaning only the chairman or umpire can be considered impartial. Those arbitrators sitting as wings are often dependent on their appointer attorneys for income and will normally argue the case on behalf of their appointer. The result is that there is no opportunity for the chairs to be objectively second guessed, and confidence in the process and the veracity of the awards is diminished.

In 2011, ARIAS US, the body that promotes the improvement of insurance and reinsurance arbitration proceedings, established a task force to look at, among other things, the arbitrator selection process and the use of “neutral panels.” There is an acknowledgement that the system has its flaws. London-based arbitration is different in that all arbitrators on the panel are expected to be dispassionate and nonaligned.

C. ADVANTAGES OF ARBITRATION IN INSURANCE CLAIM DISPUTES

It has been said that insurers have more confidence in insurance industry experts to resolve disputes than they have in juries or judges, and favor confidentiality and the noncreation of precedent over the right to appeal. Commercial policyholders might come out the other way, favoring juries or judges and appellate rights over expertise and confidentiality. Thus, even sophisticated commercial insureds have resisted arbitration of insurance disputes.

But the tide is changing, and arbitration clauses are appearing with increasing frequency in all manner of commercial contexts, including professional liability, commercial liability, and casualty insurance policies. Such arbitrations typically

---

14. Under the English Arbitration Act, as in other contexts, there are mechanisms for selection of the third neutral in the absence of agreement.

proceed under either (1) the standard commercial arbitration model in which the parties together select either one neutral arbitrator or a tripartite panel of neutral arbitrators, or (2) a modified reinsurance model where the parties each select two non-neutral arbitrators with insurance industry expertise or experience, who in turn select a neutral umpire, more likely now to be a professional arbitrator (likely an attorney or retired judge, and frequently someone with insurance experience).

There are several advantages to arbitrating insurance coverage disputes, including first-party claims and third-party claims. Excess policies are likely to incorporate the occurrence and exclusion provisions of the primary policy, meaning that each layer of insurance is triggered by the happening of the same occurrence, and subject to the same exclusions. Thus, common issues may arise concerning conditions of coverage, applicable exclusions, and the sufficiency of notice. Sometimes these are purely legal questions, but often they are mixed questions of fact and law. One advantage of arbitration is that obtaining a ruling on an issue of contract interpretation, which will affect each layer of insurance, is likely to occur far more expeditiously than obtaining dispositive rulings in court with the attendant burdens and delay of civil litigation.

Sometimes when there is a coverage issue, and frequently when there is a dispute as to the value of a claim (assuming value will not be determined by appraisal), there will be a need for a fact-based inquiry. Another advantage of arbitration over litigation in this context is that the parties can mix and match procedures in order to narrow the issues in dispute and make the fact-finding process more efficient. For instance, the parties to an arbitration can craft a narrow hearing, as opposed to a full-blown trial, to deal with discrete fact issues, while resolving purely legal issues on the papers.\(^{16}\) Thus, in the coverage context, hearings are frequently streamlined and used for the purpose of oral argument or expert testimony rather than fact witnesses. Furthermore, like most arbitrations, there is a presumption that discovery will be limited. Generally, the policyholder is entitled to the claims file, excluding attorney-client privileged material, and the insurer is entitled to any relevant documents explaining or attendant to the underlying claim. Depositions of fact and expert witnesses are also permitted, but limited in number, duration, and scope.\(^{17}\)

---

16. The primary insurer is likely to have a duty to defend the insured in an underlying lawsuit that establishes the insured’s liability, if any, to a third party. Thus, one initial dispute that might find its way to arbitration is whether the primary insurer has a duty to defend the insured in the underlying third-party lawsuit. These disputes are often resolved as a matter of law, and, often, under expedited procedures in the arbitration.

17. In the context of third-party insurance, the parties have the benefit of a full record from the underlying lawsuit.
Arbitration may be advantageous, but getting agreement on an efficient arbitration process may require some work. An oft-occurring situation is that an insured—particularly a large commercial insured—typically enters separate policies with each insurer in a tower of insurance, with no contract between the insurers. This fact raises clear obstacles with respect to arbitration. First, not every policy will contain an arbitration clause. Second, even if all or most of the policies contain arbitration clauses, those clauses may call for arbitrations in varying fora under different rules—one may be Bermuda Form, another may require arbitration in New York with a tripartite panel consisting of two non-neutral arbitrators and one professional arbitrator, and so on. Third, even if all policies contain arbitration clauses, and each clause specifies the same forum, each insurer will have the right to a separate, confidential arbitration, and consolidation generally cannot be compelled under the FAA.18

These issues present obstacles to global resolution of a dispute, but parties have not shrunk from the challenge, and the flexibility inherent in arbitration has proved useful. For instance, parties not compelled to arbitrate may agree to do so because the language of the excess policies frequently tracks the language of the primary policy, meaning that if the insured has an interpretation dispute regarding the primary policy, it is likely to have the same dispute with respect to the excess policy. At the same time, an excess insurer is unlikely to settle a dispute until the insurer below it in the tower has settled or has had its coverage dispute resolved. Hence, obtaining from one adjudicator an interpretation that applies to all insurers may be in the interests of both the insurers and the insured. Proceeding with one adjudicator not only eliminates the inconvenience that multiple inconsistent rulings would provide, but also, as a practical matter it is far more expeditious to consolidate arbitrations into a single forum in a single arbitration.

Even so, insurers have sometimes insisted on their right to separate, confidential arbitrations. In those situations, the policyholder is likely to have the same party-appointed arbitrator in each arbitration, but there will likely be a different insurer-appointed arbitrator and a different umpire. Thus, just as neutrality issues must be self-policing,19 it is imperative that arbitrators respect and maintain party

---


19. As a practical matter, it is imperative that both neutral and non-neutral arbitrators and umpires understand their roles and their duties and police themselves accordingly; the parties are often stuck with arbitrators up until an award is issued, even if there is bias. See, e.g., Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co., 304 F.3d 476, 490 (5th Cir. 2002) (“[T]he FAA appears not to endorse court power to remove an arbitrator for any reason prior to issuance of an arbitral award” and thus, “prior to issuance of an award, a court may not make inquiry into an arbitrator’s capacity to serve based on a challenge that a given arbitrator is biased”).
confidentiality, even in such unusual and potentially cumbersome circumstances.\textsuperscript{20}

In situations where arbitrations do not proceed simultaneously—meaning, for example, that by the time of the second arbitration, the liability of the primary insurer may have already been determined—arbitrators have successfully kept proceedings confidential.

Notably, efficiency can be achieved even where there are separate proceedings, by coordinating discovery and other procedural matters. Alternatively, parties in these circumstances can agree to a sequence of the hearings such that the result—either the final award or the results on particular issues—in the first arbitration might be argued to be precedent, or at least persuasive or instructive, in the subsequent hearings, or might inform settlement efforts in those other hearings.

\textbf{D. ARBITRATION LAW AND PROCEDURE}

\textit{1. Federal Arbitration Act, Preemption, and the McCarran-Ferguson Act}

The FAA was enacted in 1925 in response to judicial hostility to arbitration agreements. That statute provides that “:\textsuperscript{21}written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Under this provision, which the Supreme Court has described “as reflecting both a liberal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract,” courts are required to enforce arbitration agreements.\textsuperscript{22} This means that a dispute subject to an enforceable arbitration agreement must be arbitrated if at least one of the parties to the agreement demands arbitration. In determining whether a dispute is subject to arbitration, courts consider “(1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so,

\textsuperscript{20}. \textit{See, e.g., JAMS Comprehensive Arbitration Rules & Procedures Rule 26(a) (“JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.”); JAMS Arbitrators Ethics Guideline I v.A (“Unless otherwise agreed by the Parties, or required by applicable rules or law, an Arbitrator should keep confidential all matters relating to the Arbitration proceedings and decisions.”); Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization (“An arbitration proceeding is a private process. In addition, AAA staff and AAA neutrals have an ethical obligation to keep information confidential. However, the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public.”).}

\textsuperscript{21}. 9 U.S.C. § 2; \textit{see also id. §§ 3 (allowing litigants to seek a stay of court proceedings to pursue arbitration of claims under agreements made enforceable by section 2), 4 (providing a mechanism for petitioning a court to compel arbitration).}

\textsuperscript{22}. \textit{AT&T Mobility LLC v. Concepcion}, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).
(2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement.”

By its terms, the FAA applies to maritime contracts and contracts involving commerce. Courts have interpreted “commerce” broadly—coextensive with congressional power under the Commerce Clause—such that the FAA governs most commercial contracts. Although “[t]he FAA contains no express pre-emptive provision,” the Supreme Court has held that the FAA preempts substantive and procedural laws that disfavor or treat arbitration agreements differently than other contracts. However, in the insurance context, there is a significant exception to FAA preemption. As reflected in the McCarran-Ferguson Act, insurance regulation is generally left to the states, and “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.” Courts have interpreted the McCarran-Ferguson Act as authorizing “reverse preemption” of general federal statutes by state law enacted for the purpose of regulating insurance.

Courts generally apply a three-part test to determine if a state statute reverse-preempts a federal statute under the McCarran-Ferguson Act: whether “(1) the federal statute in question does not specifically relate to insurance; (2) the state law at issue was enacted to regulate the business of insurance; and (3) the federal statute at issue would invalidate, impair, or supersede the state law.” Applying the foregoing analysis, the FAA does not specifically relate to insurance, therefore making it vulnerable to reverse preemption. Thus, if there is a state statute that relates specifically to the arbitration of insurance disputes, it might preempt the FAA.

---

27. See Minnieeland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., 867 F.3d 449, 453–54 (4th Cir. 2017) (explaining that Virginia statute renders void mandatory arbitration provisions in insurance contracts governed by Virginia law and that there was no dispute that under McCarran-Ferguson the FAA is preempted by the Virginia Law); Am. Bankers Ins. Co. of Fla. v. Inman, 436 F.3d 490, 494 (5th Cir. 2006) (holding that Mississippi statute prohibiting required arbitration of disputes stemming from uninsured and underinsured motorist coverage provisions of personal automobile insurance policies reverse-preempts the FAA); Nat’l Union Fire Ins. Co. of Pittsburgh, PA. v. Seneca Family of Agencies, No. 17-CV-01061, 2017 WL 2536845, at *3 (S.D.N.Y. June 12, 2017) (holding that the FAA did not preempt a California Insurance Code provision requiring workers’ compensation insurers to disclose to California employers that choice of law and choice of venue or forum could be a jurisdiction other than California and that those terms were negotiable between them); Am. Health & Life Ins. Co. v. Heyward, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding that South Carolina law prohibiting mandatory arbitration provisions in insurance contracts reverse-preempts the FAA).
2. Discovery

Discovery in arbitration is far more limited than it is in litigation. Such limitation is viewed as important to making arbitration a cost-effective and expedient form of binding dispute resolution. More extensive discovery, while causing delay and expense, has traditionally been considered unnecessary for a fundamentally fair hearing, the touchstone of arbitration.

However, experienced practitioners and arbitrators, the major arbitration providers, and the drafters of the Revised Uniform Arbitration Act (RUAA), among others, recognize that a one-size-fits-all approach to prehearing discovery is unworkable given the range of disputes that are subject to arbitration. The reality is that prehearing discovery, even from nonparties, is often necessary—at least to some degree—in commercial arbitration, particularly in large, complex cases. Typically, therefore, arbitrators are authorized by the parties’ agreement, the rules of the major arbitration providers, or, where applicable, the RUAA or similar state law—unless the parties’ agreement modifies the rules of the arbitration provider or such applicable state law—to assess the complexity and needs of the litigants to determine the scope of permissible discovery. In all likelihood, however, the arbitration will still involve less discovery than is available in traditional court litigation.

3. Hearings

Parties to an arbitration expect to receive a fair hearing, which is often thought of in due process terms—notice and opportunity to be heard. It is common practice for parties to submit prehearing statements that identify the witnesses and exhibits and summarize the evidence and arguments. Another practice, particularly when arbitrating under a London arbitration clause, is for parties to provide all of the materials they intend to use at the hearing.

Most arbitration hearings begin with opening statements and then proceed to the introduction of witness testimony and other exhibits. Arbitrators are not bound to follow the rules of evidence—unless the parties’ agreement provides otherwise—and there is typically a more relaxed standard for the admissibility of evidence than in a court hearing or trial. It is also common for arbitrators to ask clarifying questions of
witnesses and counsel during the hearing. Following the presentation of evidence, the panel may take closing arguments and close the record. Alternatively, many arbitrators will leave the record open for the submission of post-hearing memorandum summarizing the evidence. Arbitrators accepting post-hearing submissions may also schedule closing arguments after such submissions, and then close the record.

4. Awards
Once the record is closed, the arbitrator has a finite period of time—usually 30 days—to complete the final award, setting forth his or her conclusions as to liability and damages. An award must be written and signed by the arbitrator, but typically a reasoned award is not required by statute. It is therefore common for parties to specify in the arbitration agreement that the arbitrator is to issue a reasoned award explaining the factual and legal bases for the conclusions reached. This practice may cost the client more money, but a well-crafted award is often invaluable to a client’s understanding of the fairness of the result.

a. Enforcement of and Challenges to Awards
Arbitration awards are binding, but it is likely necessary to petition a court to confirm the award in order to obtain a judgment. Such proceedings are typically summary

31. A “final award” resolves all issues submitted to arbitration such that no further adjudication by the arbitrator is required. An “interim award” may refer to (1) an award that resolves some, but not all of the claims or issues in the arbitration, such as where a party seeks summary adjudication of all or some of the pending claims and the resulting ruling does not dispose of all the claims in the arbitration; (2) an award determining liability but not damages—which is frequently referred to as a “partial final award”; or (3) an award granting interim relief, such as the issuance of an injunction by an emergency arbitrator. An interim award should not be confused with the various interim “orders” an arbitrator may enter throughout the case to resolve procedural matters, such as the issuance of a scheduling order or an order resolving a discovery dispute.

32. See Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984) (“The award need not actually be confirmed by a court to be valid. . . . A party, successful in arbitration, seeks confirmation by a court generally because he fears the losing party will not abide by the award. Armed with a court order the winning party has a variety of remedies available to enforce the judgment.”) (internal citations omitted); compare Cal. Code Civ. Proc. § 1287.6 (“An [arbitration] award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration.”) with id. § 1287.4 (“If an award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification.”).

While a case out of Florida seems to suggest that an unconfirmed arbitration award is the equivalent of a judgment under Florida law, see Capital Factors, Inc. v. Alba Rent-A-Car, Inc., 965 So. 2d 1178, 1182 (Fla. Dist. Ct. App. 2007), as explained in Del Monte Intl' GMBH v. Ticofrut, S.A., 2017 WL 2901326, at *4 (S.D. Fla. Jan. 30, 2017), the “Capital Factors Court did not authorize post-judgment garnishment for an unconfirmed award, rather, it merely determined that an unconfirmed award was liquidated and qualified as a debt due” that could be subject to a writ of garnishment on behalf of the party in the case, who “already had a judgment it was seeking to enforce.”
in nature. Similarly, while parties may make a motion to vacate an arbitration award, such motion “is not an occasion for de novo review of [the] award.”

Instead, judicial review is severely limited. Under the FAA a court may only vacate an arbitration award:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Each of these grounds is narrowly construed, “[t]he showing required to avoid summary confirmation of an arbitration award is high, and a party moving to vacate the award has the burden of proof.” Further, because an arbitrator’s findings of fact and law are not subject to judicial review, arbitration awards are rarely vacated.

Section 10(a)(3), for example, “has been narrowly construed so as not to impinge on the broad discretion afforded arbitrators to decide what evidence should be presented.” “Courts have interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review.” In this context, fairness requires that the arbitrators provide notice and “give each of the parties to the dispute an adequate

34. 9 U.S.C. § 10(a). In addition, in the Second, Ninth, and other circuits, while the words “manifest disregard for law” do not appear in the FAA, they have come to serve as a judicial gloss on the standard for vacatur set forth in FAA § 10(a)(4). Johnson v. Wells Fargo Home Mortg., Inc., 635 F.3d 401, 414 (9th Cir. 2011); accord Ortiz-Espinosa v. BBVA Sec. of P.R., Inc., 852 F.3d 36, 46 (1st Cir. 2017); T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 340 (2d Cir. 2010). Notably, courts do “not recognize manifest disregard of the evidence as proper ground for vacating an arbitrator’s award.” Wallace, 378 F.3d at 193 (internal quotation marks omitted). As with motions under section 10(a)(4), “[m]anifest disregard . . . is an extremely narrow standard of review. It means much more than failure to apply the correct law.” Kurke v. Oscar Gruss & Son, Inc., 454 F.3d 350, 354 (D.C. Cir. 2006) (internal quotation marks omitted).
opportunity to present its evidence and argument.”38 At the same time, providing an adequate opportunity to be heard does not require arbitrators to “follow all the niceties observed by the federal courts” when making rulings on evidence or discovery.39

Courts therefore look to whether the party was given an opportunity to argue why the excluded evidence should have been presented. But the burden of proof is high. As long as some evidence that is material and pertinent to the issue has been allowed, vacatur is unlikely.40 Thus, “[i]n practice, ‘vacatur is only permitted where the arbitrator’s exclusion of evidence prejudices [or causes substantial harm to] one of the parties.’”41

And under section 10(b)(4), the “sole question . . . is whether the arbitrator (even arguably) interpreted the parties’ contract, not whether he got its meaning right or wrong.”42 Accordingly, “[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.”43 Furthermore, a “party alleging an arbitrator’s manifest disregard of the law bears a heavy burden. Arbitral awards are vacated on the basis of manifest disregard only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent.”44

E. DRAFTING ARBITRATION AGREEMENTS

Whether an arbitration clause is included as part of the insurance policy or agreed to after a dispute has arisen, parties drafting arbitration agreements governing

---

38. Id. at 20 (quoting Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901, 763 F.2d 34, 39 (1st Cir. 1985)); see NYKCool A.B. v. Pac. Fruit, Inc., 507 F. App’x 83, 88 (2d Cir. 2013) (holding that “where a party has not identified in what way an evidentiary hearing would have benefitted it, due process is satisfied by the tribunal giving the parties notice that it will be considering an issue and the opportunity to respond in a written presentation.”) (internal quotation marks and brackets omitted).

39. Tempo Shain Corp., 120 F.3d at 20 (internal quotation marks omitted); see TIG Ins. Co. v. Glob. Int’l Reinsurance Co., 640 F. Supp. 2d 519, 522–23 (S.D.N.Y. 2009) (“Although arbitrators ‘must give each of the parties to the dispute an adequate opportunity to present its evidence and argument,’ there is no requirement that they follow the Federal Rules of Civil Procedure or the Federal Rules of Evidence, and vacatur under this section is warranted only in those rare circumstances where the arbitrator’s conduct ‘amounts to fundamental unfairness.’”).

40. See Mical v. Glick, 581 F. App’x 568, 570 (7th Cir. 2014) (“[T]he fundamental fairness standard typically is met only when an arbitrator wrongly excludes the sole evidence on a pivotal issue.”).


primary and excess policies should consider issues relating to scope, forum, governing rules (including with respect to discovery), the number of arbitrators and how those arbitrators are appointed, consolidation, confidentiality, and the form of the award.

1. Scope

Parties should be careful to define the scope of the disputes that are subject to mandatory arbitration. An agreement can cover all disputes among the parties, all disputes except claims for extra-contractual remedies, or simply disputes regarding interpretation of the insurance policy. The agreement may also specify whether as a preliminary matter the arbitrator or a court should address issues of arbitrability or enforceability of the arbitration clause, although the selection of the rules of a particular arbitration administrator that authorize an arbitrator to make such determinations may be sufficient. While injunctive relief is rarely at issue in coverage disputes, it is advisable not to limit the power of the arbitrator to particular types of relief, as this may create a need for continued proceedings in court following or during the arbitration. Finally, because declaratory relief is often sought with respect to coverage disputes, it is advisable for the arbitration provision to state that the

---

45. Note that

even if a particular coverage dispute is subject to an arbitration clause, a claim for the breach of the covenant of good faith and fair dealing by the insurer is generally not subject to arbitration. Arbitrators are generally not entitled to award punitive damages unless the arbitration clause specifically provides otherwise.

Thus, a policyholder could find itself arbitrating the contractual interpretation portion of a coverage dispute and, thereafter, litigating the claim again as part of bad faith litigation in court.

Where a bad faith claim is part of the dispute, it may be more efficient for the insurer and policyholder to just litigate all issues at once rather than engaging in a piecemeal arbitration followed by litigation covering many of the same facts, documents, and witnesses. In any event, a policyholder should be careful not to allow any potential bad faith claims to somehow be limited by the existence of an arbitration clause.


46. See, e.g., Washington v. William Morris Endeavor Entm’t, LLC, No. 10 Civ. 9647, 2011 WL 3251504, at *1 (S.D.N.Y. July 20, 2011) (enforcing incorporated rule of arbitration association authorizing arbitrator to decide arbitrability issues); see JAMS Comprehensive Arbitration Rules & Procedures Rule 11(b) (“Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.”); AAA Commercial Arbitration Rules and Mediation Procedures Rule 7(a) (“The arbitrator shall have 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 or to the arbitrability of any claim or counterclaim.”).
arbitrator has the power to resolve coverage and other disputes by rendering declaratory relief.47

2. Forum, Governing Law, and Rules
The arbitration agreement should identify the forum, which may include the venue of the hearing, and can also include a specific institution charged with administering the arbitration. As in many other contexts, the chosen venue or forum is a significant consideration, including for reasons of convenience to the parties. A primary consideration for a domestic insured purchasing excess coverage from an international carrier is whether the carrier requires the arbitration of disputes in a foreign jurisdiction.48 Parties should also consider that while the underlying policy may specify what law governs the interpretation of its terms, it is sometimes advisable to specify a different law to govern the interpretation of the arbitration clause itself. By the same token, if the underlying policy fails to indicate the governing law for substantive claims, the parties can identify that law in the arbitration agreement.

Parties should not attempt to create a set of governing procedural rules out of whole cloth. Instead, they can choose the procedural rules of a particular arbitration administrator by naming that administrator in the arbitration clause and adopting its rules (or simply by adopting the rules) or, alternatively, stipulate that the procedural rules of a particular jurisdiction apply.49 (The latter suggestion—for example, to apply the civil procedure rules of a given state—is discouraged; rules that might make sense for litigation in court frequently do not apply for arbitration.) At the same time, unlike in a litigation where the parties’ selection of a forum subjects them to the court’s rules, in arbitration—even when a specific administrator’s rules are selected—the parties can modify the governing rules, including with respect to evidence and discovery, so that the process unfolds in a manner that best suits the parties’ needs. So long as modifications are made explicit they will almost always be honored.50

47. See, e.g., Hartford Accident & Indem. Co., 246 F.3d at 225, 226–28 (holding that request for declaratory relief was ripe where “a difference or dispute exists over the construction of the blanket contracts and their application to billed and unbilled pollution claims” and that this relief was subject to arbitration).
48. As discussed above, in the context of high excess catastrophic liability coverage, a policy requiring Bermuda Form arbitration may be the purchaser’s only option.
49. It is also not uncommon for parties to stipulate that particular rules of discovery or evidence apply.
50. See, e.g., AM. ARBITRATION ASS’N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 7 (2013) (“The parties are free to customize and refine the basic arbitration procedures to meet their particular needs. If the parties agree on a procedure that conflicts with otherwise applicable AAA rules, the AAA will almost always respect the wishes of the parties.”).
Parties may also explicitly choose what type of arbitration they would like, including the extent to which the award is binding. For instance, they can choose “bracketed arbitration” (sometimes referred to as “high-low” arbitration) in which the parties agree to limit the possible range of damage awards. The claimant will agree to accept not less than a specific sum and the respondent agrees to a cap on its liability. Significantly, if the arbitrator’s award falls within the agreed-upon sums, it is binding; if it does not, damages are limited or decreased in accordance with the agreed-upon bracket.

Parties may also opt for “baseball” arbitration (sometimes referred to as “Final Offer” arbitration) where the claimant and the respondent each separately submit a final offer or demand to the arbitrator who chooses between the two based upon the parties’ arguments and evidence. They may also choose to combine mediation and arbitration in what is known as “med-arb” (usually with the same neutral slated to act as the mediator and, if necessary, the arbitrator). Finally, parties can opt for nonbinding arbitration.

3. Arbitrators: Number, Type, and Selection
When drafting an arbitration provision, the parties should specify whether a panel of one or three arbitrators will be used. Again, the parties have ample discretion as to the composition of the panel and the method of choosing the arbitrators. In the case of a tripartite panel, the parties can choose how the arbitrators and the umpire will be selected and whether to require the panel to be composed of insurance insiders, insurance law experts, and/or professional arbitrators, and whether party-appointed arbitrators will be neutral or non-neutral. At least one practitioner has argued that “[g]iven that there are far more people who work on the insurer side of the industry than work on the policyholder side, [the inclusion of either an insurance company insider or insurance law expert] . . . builds a pro-insurer bias into the process.”51 However, there is a clear difference between an insurance-industry insider and an expert in insurance law, such as an attorney who may have represented policyholders, and insurance company insiders are bound by ethical duties when they act as arbitrators. Finally, parties should be mindful that if the required arbitrator credentials are too specific it may be difficult to find a qualified, nonconflicted arbitrator within a reasonable time frame.

4. Consolidation and Confidentiality
The parties may wish to include a provision that allows either party to seek consolidation with an arbitration between the policyholder and another insurer in the same tower of insurance and to permit such consolidation when requested. Such a provision will allow multiple disputes to be addressed in a single arbitration.

party-selected or non-neutral arbitrators are used, the parties must consider rules for maintaining confidentiality across consolidated arbitrations. Another consideration will be the extent to which and what types of ex parte communications are permitted.

5. Form of Award
The agreement should specify the form of the award. For example, the parties may also find it advisable to require a reasoned award, in which an arbitrator sets forth the facts, governing law, and the basis for his or her ruling. Finally, the agreement should specify that judgment may be entered on the award.

III. Appraisal

A. Overview
Most property insurance policies, including the standard fire insurance policy, provide that after a covered loss has occurred and the parties cannot agree on the value of the damage to the subject property or the amount of loss, either party may demand an appraisal. An appraisal in this context is a way to determine, by a method agreed to by the parties in the policy, the fair value of the damage to the subject property, the value of the property after the damage, or the value of the loss. The purpose of an appraisal is “to submit disputes to third parties and effect their speedy and efficient resolution without recourse to the courts.”

---

52. See, e.g., Jerry, Dispute Resolution, Insurance, and Points of Convergence, supra note 4, at 271 (“Today, appraisal provisions are found in many of the standard Insurance Service Organization (ISO) forms (including the personal and business auto policies, the homeowners forms, the business owners form, and the standard building and personal property coverage form, all of which are widely used by insurers in the U.S.), the standard ‘165 line’ fire insurance policy (which is fairly described as the root of all property insurance at in the U.S.), and the standard flood insurance policy forms offered under the National Flood Insurance Program.”).

53. Indeed, a number of states require fire insurance policies to include an appraisal provision. See, e.g., CAL. INS. CODE § 2071; N.J. STAT. ANN. § 17:36-5.20; N.Y. INS. LAW § 3404; VA. CODE ANN. § 38.2-2105. Notably, however, some states, including Arkansas, Kansas, and Nebraska, prohibit appraisal provisions in insurance contracts—just as they do arbitration provisions. See, e.g., Friday v. Trinity Universal of Kan., 262 Kan. 347, 939 P.2d 869 (1997); Rawlings v. Amoco Ins. Co., 231 Neb. 874, 876, 438 N.W.2d 769, 771 (1989) (“The extent of a party’s obligation of payment or right of recovery is no less a function of the insurance contract than is the existence of the obligation or right. Accordingly, both aspects of the contract are subject to judicial resolution, and any predispute effort to bind the parties to forgo resort to the courts on either issue ousts the courts of their legitimate jurisdiction. Nor is there any merit to Amco’s implied suggestion that the approval of its policy language by the Department of Insurance is evidence that the public policy of this state is as Amco contends. Although the Department of Insurance does important work, it is not the guardian of the judicial rights the citizens of this sovereign state enjoy.”).

A dispute is ripe for appraisal only if there is disagreement as to the amount of loss or the value of the damaged property. In such situations, either party may make a written demand for appraisal. Once a demand is made, each party selects a competent and independent appraiser, and the two appraisers then choose a neutral umpire. The appraisal process is generally informal (though, as discussed below, can be in the nature of an adversarial hearing); in the words of one court, “[a]ppraisals [generally] require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings.” Under most appraisal clauses, an award can be issued when both appraisers agree on the value or when the umpire agrees with at least one of the appraisers as to the amount.

B. ADVANTAGES OF APPRAISAL

At its best, appraisal is far less costly and far faster at quantifying damages than traditional court litigation (or even arbitration). As noted, an appraisal is not a judicial proceeding, and invocation of an appraisal clause typically does not require court involvement (although, as will be discussed, court involvement is sometimes sought when appraisal is resisted by one of the parties). Appraisal can be used in conjunction with other forms of dispute resolution, particularly where the parties dispute not only the amount of loss but also issues related to coverage. When appraisal is permitted to proceed before the coverage dispute is resolved, knowing the potential damages in case of liability can reduce posturing and focus the parties on the benefits of settlement (the avoidance of risk, litigation costs, and delay). Likewise, the appraisal process may develop facts that are relevant to liability, which can be useful in mediation, arbitration, or trial. For instance, as will be discussed below, where there are multiple causes, some of which would yield coverage under the policy and some of which would not, the appraisers may, depending on the jurisdiction, be permitted to make an assessment of damages based on the potential causes, and these causation assessments may also be relevant to coverage.

C. APPRAISAL PROVISIONS

The specific language may vary, but the following clause, which tracks the standard appraisal clause for fire insurance policies mandated by statute in New Jersey, is representative:

55. As will be discussed, when there is also a dispute about coverage, some jurisdictions may require the coverage issue to be litigated prior to the appraisal.
57. See, e.g., Noa v. Fla. Ins. Guar. Ass’n, 215 So. 3d 141, 142 (Fla. Dist. Ct. App. 2017) (“Although the insured’s appraiser disagreed with the appraisal award and declined to sign it, the appraisal clause in the insurance policy specified that the award would become effective if signed by any two of the party appraisers and the umpire.”).
58. In addition, as noted by one commentator, the informality and flexibility of the appraisal process can work particularly well in cases of catastrophic loss. See generally Randall W. Wulff, Appraising the 9/11 Damages to the World Trade Center, 62-OCT DISP. RESOL. J. 10 (Aug.–Oct. 2007).
59. See N.J. STAT. ANN. § 17:36-5.20.
Appraisal. If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal. If either makes a written demand for appraisal, each shall select a competent, disinterested appraiser. Each shall notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers shall then select a competent, impartial umpire. If the two appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select an umpire. The appraisers shall then set the amount of the loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of these three shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by you and us.60

Notwithstanding the wording of the typical clause, which suggests that the appraisers select the umpire in all instances, umpires are often selected and utilized only if the appraisers disagree as to value.61

While many clauses—such as the one above—state that the parties shall bear their own costs, some may require the insurer to pay the costs of appraisal. An appraisal clause also will typically state that the insurer retains the right to deny a claim notwithstanding appraisal, such as where there is a dispute as to coverage.62 Finally, it is possible for a contract not to require that the appraisers be independent (leaving that qualification solely for the umpire), but independence might nonetheless be required under state law.63


62. It should also be noted that a typical commercial property policy will contain the following payment language: "In the event of loss or damage covered by this Coverage Form, at our option we will either: (1) pay the value of loss or damaged property; (2) pay the cost of repairing or replacing the lost or damaged property; (3) take all or any part of the property at an agreed or appraised value; or (4) repair, rebuild, or replace the property with other property of like kind and quality."

63. Compare Citizens Prop. Ins. Corp. v. M.A. & F.H. Props., Ltd., 948 So. 2d 1017, 1020 (Fla. Dist. Ct. App. 2007) ("Contrary to Citizens' suggestion on this appeal, competence is not synonymous with neutrality or independence. While the policy's language required that the appraisers selected by the parties be competent, it did not require them also to be neutral or independent. Indeed, the policy language only required that the umpire be both competent and independent."). with Cent. Life Ins. Co. v. Aetna Cas. & Sur. Co., 466 N.W.2d 257, 261 (Iowa 1991) ("An inherent qualification for a quasi-judicial decision-maker is disinterest in the result. Consequently, the omission of the word 'disinterested' in describing 'appraiser' in the appraisal agreement does not eliminate the requirement.").
D. RIPENESS AND PROCEDURE

1. Ripeness

Following damage to property and the filing of a claim with the insurer, most policies require the insured to comply with certain “post-loss conditions” as a prerequisite to recovery. These post-loss conditions typically require the insured to “(1) provide immediate notice to the insurer; (2) protect the property from further damage; (3) exhibit the damaged property for inspection; (4) submit to an examination under oath; and (5) provide records and documents as requested by the insurer.”

Generally, a dispute will be ripe for appraisal only after these five steps have occurred and the insurer and the insured disagree as to the amount of loss. Furthermore, in some jurisdictions appraisal may not be ripe until after the parties have resolved any coverage disputes, which, unfortunately, may undermine some of the benefits of appraisal discussed above. And in Florida, for example, it is left to the court to decide on a case-by-case basis whether to have appraisal before resolution of coverage disputes or to have both proceed at the same time.

In many cases, the focus of the disagreement over the amount of loss will be clear—the insured and the insurer agree that certain property was damaged, but disagree as to the extent of the damage and/or as to certain items of alleged loss. However, other situations are far more complicated. For example, the insurer may agree that some loss occurred, but believe that the loss is below the deductible, making appraisal an unnecessary cost. In other situations, multiple carriers insure the same property and they disagree regarding the need for an appraisal. For instance, following September 11, one of the insurers for World Trade Center Properties demanded an appraisal over the objections of other insurers of the properties, some of which preferred that the loss amount be determined by a jury. The court ultimately compelled the appraisal on the basis that the demanding insurer had a contractual right to it, but noted that one consideration militating against enforcement of the appraisal provision was that “[t]he enforcement of appraisal rights . . . where only

65. The predicate “disagreement” for appraisal is itself very often supported by the opinions of engineers or other experts retained by the insurer and the insured to inspect the property and render valuation opinions.
66. For example, the Supreme Court of Alabama has held that coverage issues must be determined prior to an appraisal. Rogers, 984 So. 2d 382. By contrast, an Iowa appellate court held that “where a party has demanded an appraisal, the process should go forward with other judicial determinations waiting until after the process has been completed,” reasoning that otherwise there was a “risk of short-circuiting the benefits of the appraisal procedure, which is designed to be an expeditious process without the necessity of judicial intervention.” N. Glenn Homeowners Ass’n v. State Farm Fire & Cas. Co., 854 N.W.2d 67, 72 (Iowa Ct. App. 2014).
some of the insurers are seeking an appraisal[] may unfairly multiply the proceedings in which the [insured is] forced to litigate the valuation issue.”68

In yet another scenario, the parties may disagree upon whether determining “amount of loss” should include consideration of what caused the damage. Recall that the purpose of appraisal is to determine the amount of the loss (i.e., damages), not whether the loss is covered under the policy (i.e., liability or coverage). Courts agree that coverage determinations are made exclusively by courts (or, where permitted, arbitration panels) and not during the appraisal process.69 But consider a situation in which the insured claims a total loss following a tornado, and the insurer counters that the tornado only caused some of the damage but the majority of the damage was caused by settlement. Because wind damage is a covered loss under the policy, and settlement is not a covered loss, the question of what caused the damage can be viewed as relevant to both coverage and the amount of loss. “Courts across the country are divided as to whether, in determining the ‘amount of loss’ pursuant to appraisal provisions . . . appraisers may consider questions of causation.”70

In Rogers v. State Farm Fire & Casualty Co.,71 the Supreme Court of Alabama decided causation issues were outside of the scope of appraisal. In that case, the insureds’ residence was damaged by a tornado and they claimed a total loss, but the insurer’s engineer concluded that the damage to the brick veneer and the foundation was not the result of the tornado, but the result of settlement (which was not covered).72 The insureds then retained an engineer who found that the damage to the brick veneer and the foundation were due to stress placed on the house by the

---

68. SR Int’l Bus. Ins. Co. v. World Trade Ctr.Props. LLC, No. 01 Civ. 9291, 2002 WL 1905968, at *6 (S.D.N.Y. Aug. 19, 2002) (noting that one potential solution to the burden of multiple proceedings was “for the Court to substitute itself for the neutral umpire to whom the dispute is to be submitted if the appraisers can not agree”).

69. Compare Am. Family Mut., Ins. Co. v. Dixon, 450 S.W.3d 831, 835 n.4 (Mo. Ct. App. 2014) (stating that a policy that permitted an appraiser to determine a coverage issue “would be unenforceable as the interpretation of an insurance contract, particularly in reference to the question of coverage, is a question of law that must be decided by the court”), and Rogers, 984 So. 2d at 392 (holding that it was error for the trial court to compel the parties to appraisal were there were coverage issues), with N. Glenn, 854 N.W.2d at 72 (“We agree, where a party has demanded an appraisal, the process should go forward with other judicial determinations waiting until after the process has been completed. The plain language of the clause in this case supports this conclusion. The clause speaks in mandatory language and sets forth a strict and limited timeframe which would be rendered unrealistic, or that could be easily circumvented, if a question of coverage were to be raised. Additionally, the clause specifically reserves State Farm’s right to challenge the coverage after the appraisal process is completed. Accordingly, we find the judicial determination of coverage need not be made before an appraisal is conducted, a decision that gives life to the terms of the contract in this case.”), and id. at 71 (“By law and under the specific terms of the appraisal clause, once the appraisers conclude their work, the issue of coverage may be further litigated by State Farm.”).


71. 984 So. 2d 382 (Ala. 2007).

72. See id. at 383-84.
storm, in which case all of the damage would have been covered under the policy. After court proceedings were initiated, an appraisal process was ordered by the trial court; the umpire apparently agreed with the insurer’s view of the cause of the damage and hence the amount of the loss, and the insureds promptly challenged the appraisal on the grounds that it had improperly adjudicated issues of coverage and causation.

The Rogers court held that the trial court had erred in ordering the parties to submit to appraisal when the parties were not in agreement as to the cause of the damage to the brick veneer or the foundation. According to the court, “[t]he determination of the causation of these matters is within the exclusive purview of the courts, not the appraisers.”73 In reaching this conclusion the court lumped causation and coverage together, without parsing the issue: “[W]e conclude that the more persuasive authority is the authority holding that an appraiser’s duty is limited to determining the ‘amount of loss’—the monetary value of the property damage—and that appraisers are not vested with the authority to decide questions of coverage and liability[.]”74

The upshot of Rogers and courts taking the same view is that even where the parties can agree that some portion of the loss is covered under the policy, any disagreement about the cause of the other portions of the loss must be resolved in court (or arbitration were permitted) before appraisal can be conducted.75 Thus, parties seeking to avoid the appraisal process in these jurisdictions can, and often do, argue that the appraisal process would necessarily involve improper consideration of causation issues.

Other courts, in what appears to be a slight majority, have permitted appraisers to determine causation, recognizing that causation is an issue that is relevant to both valuation and coverage; that is, “causation” is not just another word for “coverage.”76 In Quade v. Secura, Inc., for instance, the insurer paid the insured

73. Id. at 392.
74. See id. (“This holding is consistent with the longstanding principle that the court must enforce the insurance policy as written if the terms are unambiguous.”) (internal quotation marks and brackets omitted).
75. See, e.g., Am. Family Mut. Ins. Co. v. Dixon, 450 S.W.3d 831, 836 (Mo. Ct. App. 2014) (noting that the policy at issue in the case stated the damage must be “as the result of a covered loss” and further concluding that “[t]he summary judgment evidence before us does not suggest that American Family utilized its appraisers to determine the extent of a covered loss, but instead has used the appraisal process to determine whether or not there exists a covered loss. This distinction is critical to our analysis and holding because, in that event, the appraisal provision is being used as a means of arbitration to resolve issues of coverage, which is prohibited under Section 435.350.”).
for some damage, agreeing that it had been caused by a storm, but refused to pay
for other damage, claiming that such damage was from “continual deterioration,”
which was not covered under the policy. Thereafter, the insured refused to pursue
appraisal and instead sued for breach of contract, arguing that the parties’ dispute
was about coverage, not the extent of the damage. The Supreme Court of Minnesota
disagreed, distinguishing between coverage and causation:

The record in this case suggests that the dispute here involves both a question of
damages and a question of liability. The Quades assert that the damage to the roofs
is a covered loss for wind damage. Secura asserts that the damage to the roofs is
due to wear and tear and is excluded under the policy. We believe that under the
circumstances of this case a determination of the “amount of loss” under the
appraisal clause necessarily includes a determination of causation. Coverage ques-
tions, such as whether damage is excluded because it was not caused by wind, are
legal questions for the court as this case goes forward. The Quades are incorrect that
appraisers can never allocate damages between covered and excluded perils. In this
case, the causation question involves separating loss due to a covered event from a
property’s preexisting condition.77

Notably, the court also reasoned that if causation could not be considered during
appraisal, appraisal clauses would be “render[ed] . . . inoperative in most situations,
and that result is in direct conflict with the public policy behind the appraisal process
and the fact that we have repeatedly encouraged its use in Minnesota.”78 Thus, the
availability of appraisal will often be significantly affected by which of these disparate
views the court adopts.

2. Selecting Appraisers and Umpires
Once the parties’ dispute is ripe for appraisal, the next step is for the parties to select
qualified appraisers who then select an umpire. Most policies require appraisers
and umpires to be both competent and independent, with the latter term some-
times replaced by or used in conjunction with the terms “impartial” and/or “dis-
interested.” Although parties are free to define the qualifications necessary for an
appraiser or umpire—that is, the policy terms could specify what is meant by com-
petency, independence, disinterestedness, or impartiality—most appraisal provisions
do not. As a general rule, the concept of independence at the very least requires
appraisers and umpires to disclose any relationships they believe might raise any
doubts as to impartiality.

Parties sometimes question the independence of an appraiser or the neutrality of
an umpire. Where a party questions the neutrality of an umpire, and the appraisers

77. Quade, 814 N.W.2d at 706–07.
78. Id. at 707. The court further noted that causation determinations would be reviewable by the court.
Id. at 707–08.
cannot jointly agree to replace the umpire, the proper procedure is to petition the court for removal of the neutral umpire.\textsuperscript{79} Likewise, if a party is concerned with the performance of an umpire, an appraiser does not have the authority to fire an umpire, and instead should seek relief in court.\textsuperscript{80} A challenge to the qualifications of an appraiser or an umpire may also arise in the context of a proceeding to set aside an appraisal award.

Some courts treat competency broadly to include both a required level of skill and a required level of independence. For the sake of providing a general description, we will treat “competency” as referring to a level of skill. The competency of an appraiser generally entails prior experience in valuing the type of damages property at issue. In the words of one court:

In order to perform competently as an appraiser for this purpose, and to be designated by a party or by other appraisers or the court (as an umpire), logic and common sense require that an appraiser must have experience in the estimation of materials and labor costs for the repair and replacement of damaged property.\textsuperscript{81}

As for independence, it has been said that “the object and purpose of an appraisal is to secure a fair and just evaluation by an impartial tribunal.”\textsuperscript{82} The Supreme Court of Iowa has explained:

[T]he selected participants must act fairly, without bias, and in good faith. The intent of the appraisal procedure is not to provide appraisers who possess the total impartiality that is required in a court of law. The appraisers do not violate their commitment by acting as advocates for their respective selecting parties. However, appraisers should be in a position to act fairly and be free from suspicion or unknown interest.\textsuperscript{83}

Furthermore, the application of one’s skill to determining value implies honesty in applying that skill.

As suggested by the above quote from the Supreme Court of Iowa, pinning down the meaning of impartiality and independence in the appraisal context is not straightforward. Various jurisdictions have defined and treated questions of impartiality or


\textsuperscript{83} Id. at 261.
independence, and not always in the same way. Thus, despite the vintage of the following quotation from the Supreme Court of Illinois, it remains true today:

While it is evident from an examination of the authorities that all do not agree as to the particular grounds which are sufficient to disqualify . . . appraisers, two propositions may be deduced. First, each case must, in a large measure, be governed by its own circumstances and, second, an interest or bias to disqualify may be small, but it must be direct, definite and capable of demonstration, rather than remote, uncertain or speculative.84

Perhaps the key takeaway is that courts are unlikely to disqualify an appraiser unless the movant demonstrates a clear bias.85

One area in which courts have not agreed on the grounds for disqualification involves the retention of an appraiser on a contingent fee basis, that is, an arrangement in which the appraiser’s compensation depends on the amount received by the insured. For example, in the above-cited Iowa case, an appraiser retained on a contingent fee basis was deemed to be interested.86 In Florida, however, it has been held that an insured’s appraiser who was to be paid under a contingency arrangement is still “independent.”87 In the view of that court, what mattered was whether the party controlled the appraiser, and thus “independent” meant that an appraiser must be unaffiliated with the parties.88 The court stressed, however, that disclosure of the contingency fee was required.

Another situation giving rise to a potential bias challenge is the appraiser’s prior relationship with a party. In Tiger Fibers, LLC v. Aspen Specialty Insurance Co.,89 for example, a federal district court in Virginia considered cross-motions by the insurer and the insured to disqualify each other’s appraiser. The insurer objected that the insured’s appraiser was a long-time employee of a company that the insured had retained to perform its initial damages assessment. The insured objected that the insurer’s appraiser was an independent contractor retained almost exclusively by insurers. Interpreting Virginia’s statute making an appraisal provision mandatory in fire insurance policies, the court explained:

85. See generally TAMKO Bldg. Prod., Inc. v. Factual Mut. Ins. Co., 890 F. Supp. 2d 1129, 1140 (E.D. Mo. 2012) (“An appraiser may be considered interested in a number of ways, such as being ‘frequently or habitually employed by insurers as an appraiser and . . . by his conduct [making] it clear that he understands that he is acting in their interests.’ An appraiser may also become biased by having a financial interest in the outcome of the appraisal, even if indirectly.”) (internal citations omitted).
86. Cent. Life Ins. Co., 466 N.W.2d at 261.
88. Rios, 714 So. 2d at 549.
The Virginia statutory insurance loss appraisal process requires the parties to nominate appraisers who are “disinterested,” which simply means that the selected appraisers can have no personal interest in the outcome of the insurance dispute. The selected appraisers must therefore not be permanently employed by either the insured or the insurer, or by any other insurer, but instead must be retained solely as independent contractors providing temporary professional services to the respective parties. Importantly, nothing in the Virginia statutory procedures precludes an insured from nominating as an appraiser, as Tiger did, an employee of the firm it retained to provide an initial estimate of the disputed loss. Nor does the statute preclude an insurer from appointing as an appraiser, as Aspen did, an independent contractor who, the record reflects, is retained almost exclusively by insurance companies to provide professional services.90

Courts have reached varying outcomes here as well,91 but, as a general matter, an appraiser will be considered disinterested if she is not directly controlled by a party (such as where she is an employee) or, less frequently, considered to be controlled as a result of a long-standing relationship.

An umpire often is, but need not be, an attorney.92 The umpire must be able to act with the requisite neutrality and fairness to both parties. For this reason, umpires are sometimes likened to arbitrators. Certainly an umpire should disclose any relationship he or she has with the constituents, including, of course, the appraisers. The failure to make such disclosure could result in an award being vacated.93

3. Procedures
Most appraisal clauses do not set forth the procedures that will be used to determine value. Appraisals have generally been viewed as a form of contract-based

91. Compare Cohen v. Atlas Assurance Co., 163 A.D. 381, 385–86 (1st Dep’t 1914) (holding that “[w]hile the fact that Ruppin had served as appraiser for fire insurance companies on [a half dozen] prior occasions would have a bearing upon his disinterestedness, that fact is not sufficient in itself to disqualify him”), with Coon v. Nat’l Fire Ins. Co., 213 N.Y.S. 407, 411–12 (N.Y. Sup. Ct. Jefferson Cnty. 1925), aff’d, 218 A.D. 812, 218 N.Y.S. 722 (App. Div. 1926), aff’d, 246 N.Y. 594, 159 N.E. 665 (1927) (setting aside award where appraiser had “work[ed] for and [been] retained hundreds of times by insurance companies and their agents to look after their interests in fire loss appraisals” such that “[h]e was not indifferent, not without pecuniary interest, not without a prospect of gain or loss, but was in a close and continuing relationship to the insurers and the adjustment agency”).
92. See Liberty Mut. Fire Ins. Co. v. Hernandez, 735 So. 2d 587, 589 (Fla. Dist. Ct. App. 1999) (“The practical issue is whether, in appointing an umpire pursuant to an appraisal clause, the trial court is allowed to select a person with appropriate expertise, even if the appointee is not a lawyer. We think the answer is yes, and that the trial court had the authority in this case (as the court originally ruled) to appoint a well-qualified contractor. Having said that, we also think that the trial court is allowed to consider appointing a retired judge or an attorney who has appropriate experience in the subject area which is being appraised. It was the trial court’s view that the retired judge had such experience. We do not understand the insurer to disagree, but the insurer expressed a strong preference that the umpire should be a construction professional.”).
dispute resolution, meaning that appraisal procedures have often been thought to be governed by the terms of the appraisal provision and the parties’ determinations as to the appropriate methodology. The extent to which due process norms apply to appraisals depends on the jurisdiction or whether the parties have agreed to certain norms in their policy or, following a dispute, in a post-appraisal agreement, what is sometimes referred to as an “appraisal protocol.” Parties to appraisal provisions should therefore be aware of the law in the governing jurisdiction. Parties should also consider setting forth procedures if a formal appraisal process is anticipated to be necessary in the event of an occurrence under the policy terms.

Often the formality of an appraisal depends on the circumstances, ranging from inspections and meetings among the appraisers and the umpire to a more formal undertaking involving adversarial hearings. In certain jurisdictions, however, the appraisal process can resemble arbitration (or litigation). The law of certain states sets forth mandatory procedures in the fire insurance context (although these procedures are typically not detailed), and, in the absence of such procedures, courts may impose their own guidelines. And while it appears that a majority of courts have found that arbitration statutes do not govern appraisals, some have found that they do, including in California and Minnesota. The extent to which appraisals are considered to be quasi-judicial proceedings may affect the required degree of

94. Cf. Wulff, Appraising the 9/11 Damages to the World Trade Center, supra note 58, at 13 (describing the appraisal procedure used to assess property damage the insurers would be obligated to pay in case of liability following the terrorist attack on the World Trade Center: “On any given day, there were up to 50 or more attorneys in attendance [at hearings], each with laptop access to real-time feeds from the court reporter of each word spoken. Exhibits were projected onto a large main screen and, given the size of the room, smaller satellite screens were also distributed around the room for easier viewing. The format for the hearings on each issue typically involved opening statements, followed by sworn testimony. Expedited direct testimony, whether by narrative responses or even the occasional leading question, was often encouraged. Cross-examinations were vigorous, exacting and thorough. Well over 1,000 exhibits were introduced. The hearings involved over 100 formal hearing days, in addition to months of hybrid mediation processes (med-arb). . . . To complete the appraisal and arrive at an overall dollar total, a list of nearly 20 segregable components needed to be addressed and separately resolved by the panel.”).

95. See Auto-Owners Ins. Co v. Summit Park Townhome Assoc., 129 F. Supp. 3d 1150, 1155–56 (D. Colo. 2015) (reasoning among other things that “the Colorado Supreme Court has recognized that certain protections, including the right to notice and a hearing, apply to appraisal proceedings”).

formality or uniformity in procedures, including what amounts to a fair process; it may also affect the standard of review of the appraisal award.

Where the policy indicates the procedures or the parties subsequently agree to the terms of the appraisal, the appraisers and the umpire must adhere to them (unless dispensation to act differently is provided by the parties). In the absence of procedures, and in the absence of a post-dispute agreement on appraisal protocol, the umpire may decide on procedures. It is also fair to say that an inherent feature of an appraisal process is that the appraisers must act independently of the parties and their counsel (though they may be allowed to have ex parte contact). In addition, unless otherwise specified in the agreement, ex parte communications between the umpire and the appraisers are generally permitted. But the umpire is required to consider the information submitted by both sides.

**a. Stipulating to Procedures and Protocols**

In situations where it is possible to negotiate a custom provision, the parties can detail the desired procedures, and even in the absence of specific procedures in the 97. See, e.g., Lynch v. Am. Fam. Mut. Ins. Co., 163 Wis. 2d 1003, 1010–11, 473 N.W.2d 515 (Ct. App. Wis. 1991) (“Arbitration in Wisconsin is a formal procedure, and the parties’ rights and responsibilities are defined by statute. . . . Appraisal in Wisconsin, on the other hand, is a mechanism of dispute resolution that is not regulated by statute and, depending on the parties’ agreement subjecting themselves to an appraisal process, may or may not be formal.”).

98. See, e.g., Amerex Grp., Inc. v. Lexington Ins. Co., 678 F.3d 193, 207 (2d Cir. 2012) (“Thus, while Amerex went into the appraisal with significantly less information about the Excess Insurers than the Excess Insurers had about Amerex, there was no violation of Amerex’s due process rights. It cannot be the rule that appraisals must furnish insured parties the right to extensive discovery from the insurers, as such a rule would turn appraisals into precisely the kind of quasi-judicial proceedings that New York law forbids. We therefore conclude that the appraisal’s procedures did not violate Amerex’s due process rights.”).

99. For instance, under Wisconsin law, which takes the view that the arbitration statute does not apply to appraisals, a court’s “[r]eview of an appraisal award should usually be limited to the face of the award.” Farmers Auto. Ins. Ass’n v. Union Pac. Ry. Co., 319 Wis. 2d 52, 74, 768 N.W.2d 596, 607 (2009). In response to the view of a dissenting justice that that sort of review did not “ensure a fair appraisal process,” the majority of the Supreme Court of Wisconsin responded:

> The dissent neglects the fact that the parties contracted for the appraisal process. Thus, a deferential review is in accord with the parties’ bargained-for agreement. In addition, we have not stated that review is always limited to the face of the award. Rather, we have stated that review is usually limited to the face of the award. This gives the circuit judge discretion to exercise his or her judgment in the interests of fairness, while also ensuring that appraisals are not readily subject to challenge in courts, and are given the deference they deserve. Finally, the dissent neglects the interests of efficiency and finality. The purpose of alternative dispute resolution methods such as binding appraisal is to help litigants resolve their disputes relatively quickly and inexpensively. The dissent’s approach would defeat this purpose by expanding and protracting expensive and stressful litigation—the exact opposite purpose such clauses were intended to have.

Id. at 607 n.17. But see Silverstein v. XI Specialty Ins. Co., No. 15-CV-6818, 2016 WL 3963129, at *5 (S.D.N.Y. July 21, 2016) (stating that while New York’s arbitration statute did not apply, “appraisal awards receive deferential judicial review that is similar—but not identical—to the standard of judicial review for arbitrations awards”) (citing authority).
policy, the parties can stipulate to procedures. For instance, the parties can reach an agreement on an appraisal protocol that identifies the specific property to be appraised, the procedures to be used to determine value, a standard terminology (and definitions of such terms), the scope of the appraisal (including whether issues of causation can be considered), and the form of the award. If the parties want to have formal hearings, for instance, they can agree to the format of the hearing, how evidence will be submitted, and whether there will be briefing.

4. Awards
After the evidence is presented, the umpire will render the award. Typically, an award signed by the umpire and one appraiser will be binding. Appraisal clauses are unlikely to set forth the required form of the award. However, it is probably in the parties’ best interest to have a more detailed award in the event that issues regarding scope or otherwise will arise—such as causation disputes. Parties should attempt to agree on the required level of detail prior to the appraisal. Additional factors that should be specified in the award are deductions for depreciation, if any, and inclusion and calculation of prejudgment interest, if any.

E. COURT INVOLVEMENT
Despite best intentions, court involvement sometimes becomes necessary either to resolve disputes within the appraisal process or to compel an appraisal. As with arbitration agreements, many appraisal clauses provide that if the appraisers fail to agree on the umpire, the parties can request that a court appoint the umpire. Furthermore, where a party refuses to participate in the appraisal process, the insurer or the insured can seek to enforce the appraisal clause in court, by filing a complaint or, where applicable, utilizing state procedures permitting a party to proceed by application or petition. Finally, courts may be called upon to enforce an appraisal award.

1. Compelling Appraisal
Courts will generally compel appraisal unless the insured has failed to comply with the policy’s post-loss conditions, or the demand for appraisal is otherwise

100. The appraisal protocol may also include a provision shielding the appraisers and umpire from liability.
101. Appraisal is almost always binding when governed by a particular state’s law. The lone exception is Oklahoma, which makes appraisal binding only on the party who invoked the appraisal process. Okla. Stat. tit. 36, § 4803.
103. As has been noted, appraisal is required by statute in many states with respect to fire insurance. Those statutes also typically specify that where an insured or insurer fails to proceed with an appraisal, either party may seek relief in court. See, e.g., N.Y. Ins. Law § 3408(c) (relief may be sought by application).
104. In Florida, for example, courts will hold an evidentiary hearing to determine whether post-loss conditions have been met before compelling appraisal. See Citizens Prop. Ins. Corp. v. Admiralty House, Inc., 66 So. 3d 342, 344 (Fla. Dist. Ct. App. 2011) (“Before a circuit court can compel appraisal under an insurance policy, it must make a preliminary determination as to whether the demand for appraisal is ripe.”).
defective. Apart from failure to satisfy post-loss conditions, parties seeking to avoid appraisal have advanced a number of arguments.

One argument that has been rejected (in the absence of contrary policy language) is the notion that the insured or insurer “must hire experts to evaluate the loss and then engage in good faith negotiations with the insured [or insurer] over the amount of the loss before it may invoke the appraisal process.” Another is that appraisal is not ripe where the parties dispute the formula to apply when valuing the loss during the loss. While the validity of that argument depends on the language of the appraisal clause, as suggested by the sample clause supra, appraisal is ripe under most policies when there is a disagreement as to the amount of loss (after satisfaction of the post-loss conditions). As explained by one court,

By the plain language of the insurance policy, it is immaterial that [insured] believes the cause of the disagreement concerning the actual cash value is Allstate’s alleged use of an improper valuation method. The contract makes no exception where the source of the dispute is the valuation method used: so long as the parties “fail to agree as to the actual cash value or amount of loss,” the appraisal remedy is triggered at the request of either party.

Parties have also resisted appraisal on grounds that the demand for appraisal is untimely, such as where it is made after a lawsuit has already been filed. Policies typically do not specify the time in which an appraisal demand must be made. Courts have therefore considered whether the demand for appraisal was made within a “reasonable” period, a flexible, case-specific determination that courts apply with more or less strictness depending on the jurisdiction.

Courts in New York, for instance, tend to define “reasonable” liberally, and generally “consider three factors: (1) whether the appraisal would result in prejudice to the insured party; (2) whether the parties engaged in good-faith negotiations over valuation of the loss prior to the appraisal demand; and (3) whether an appraisal is desirable or necessary under the circumstances.” A number of courts have found

105. See, e.g., Drescher v. Excelsior Ins. Co. of N.Y., 188 F. Supp. 158, 159 (D.N.J. 1960) (“Under the appropriate statutory clause in New Jersey, this Court, sitting in this diversity case, can appoint a disinterested umpire where the appraisers for both sides cannot agree on one. The refusal of the defendants to appoint an appraiser in effect amounts to the failure of the parties to select the disinterested umpire which is essential to the appraisal proceedings and it is the appointment of this individual that the Court would order.”) (citation omitted).


108. See Chainless Cycle Mfg. Co. v. Sec. Ins. Co. of New Haven, 169 N.Y. 304, 310 (1901) (“[The right to appraisal] is not indefinite as to time, but must be exercised within a reasonable period, depending upon the facts of the particular case.”).

the timing of an appraisal demand reasonable even after the commencement of litigation. Still, waiver of the right to appraisal is a risk, particularly where delay in demanding appraisal results in prejudice.

Finally, another argument that has been made, and that is unlikely to succeed, is that denial of coverage under an insurance policy constitutes waiver of the insurer’s right to request an appraisal. This is to be distinguished from situations in which the policy or governing law requires that the existence of a covered loss be adjudicated prior to the appraisal.

2. Award Enforcement

Disputes requiring court intervention can also arise after an award has been issued. The insured may seek to enforce the award if the insurer does not pay the loss amount specified in the award, and either party may seek to set aside the award. As a general matter (in jurisdictions where the arbitration review statute has been held not to apply), there are three potential grounds for setting aside an appraisal award: “(1) when the award was made without authority; (2) when the award was the result of fraud, accident, or mistake; or (3) when the award was not made in substantial compliance with the terms of the contract.” Other jurisdictions may apply stricter standards. Under New York law, for instance, “[a]n appraisal award should


111. See, e.g., In re Universal Underwriters of Tex. Ins. Co., 345 S.W.3d 404, 411 (Tex. 2011) (“Even if Universal had waited to request appraisal, mere delay is not enough to find waiver; a party must show that it has been prejudiced.”) (citing 15 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 210:77 (3d ed. 1999) (“In addition, a waiver will not be declared where there has been no showing of prejudice to the other party by a delay in demanding an appraisal.”)).

112. See, e.g., In re Universal Underwriters of Tex. Ins. Co., 345 S.W.3d at 411.

113. Dixon, 450 S.W.3d at 835 (stating that under the policy “an appraisal may only be performed once it is first established that a covered loss exists”).

114. However, as noted, the review an award is subject to may be different in the limited number of jurisdictions in which it has been held that the arbitration statute governs the appraisal. See Lee v. Cal. Capital Ins. Co., 237 Cal. App. 4th 1154 (Cal. Ct. App. 2015) (judicial review of an appraisal was limited to the review permitted under the arbitration statute).

115. Gardner v. State Farm Lloyds, 76 S.W.3d 140, 142 (Tex. App. 2002); see, e.g., Michels v. Safeco Ins. Co. of Ind., 544 F. App’x 535, 542 (5th Cir. 2013), abrogated on other grounds by Int’l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd., 818 F.3d 193 (5th Cir. 2016) (holding that “small variances from the appraisal process as outlined by the insurance policy [did not] require setting aside the appraisal award”); Harleysville Mut. Ins. Co. v. Narron, 155 N.C. App. 362, 367 (Ct. App. N.C. 2002) (“It is well-established in North Carolina that where contractual appraisal provisions are followed, an appraisal award is presumed valid and is binding absent evidence of fraud, duress, or other impeaching circumstances.”) (internal quotation marks omitted).
be upheld unless there is clear and convincing evidence that the appraiser rendered the award in bad faith without sufficient thoroughness or based on bias or fraud."\textsuperscript{116}

Like arbitration, the grounds for setting aside an appraisal award are narrow and most courts will defer to the appraisal panel. This is not to say that appraisals are immune from vacatur or modification. For instance, courts have set aside appraisal awards where an appraiser was not disinterested.\textsuperscript{117} Other courts, as suggested above, have vacated appraisal awards that went beyond the scope of determining value and addressed coverage issues.\textsuperscript{118}


\textsuperscript{117} See, e.g., Auto-Owners Ins. Co. v. Summit Park Townhome Ass’n, 886 F.3d 852, 857 (10th Cir. 2018) (affirming vacatur of appraisal award on the basis that party, Summit Park, had failed to make disclosures required by the district court and had selected a biased appraiser, and noting further that “even if Summit Park had not violated the disclosure requirement, the insurance policy would have compelled vacatur of the appraisal award. The insurance policy stated that an appraisal award is valid only if signed by two impartial appraisers, and the district court reasonably concluded that Mr. Keys was biased based on his past expressions of favoritism toward policyholders and his extensive relationship with the Merlin law firm. With Mr. Keys disqualified, the appraisal award had only one valid signature (the umpire’s). The award was therefore invalid under the terms of the insurance policy.”); Gebers v. State Farm Gen. Ins. Co., 38 Cal. App. 4th 1648, 1653 (Cal. Ct. App. 1995) (applying the arbitration statute and explaining: “An award must be vacated if ‘[t]here was corruption in any of the arbitrators.’ (Code Civ.Proc., § 1286.2, subd. (b), italics added.) The presence of an interested appraiser requires that the judgment entered on the confirmed award must be reversed, and a new appraisal conducted.”); Coon v. Nat’l Fire Ins. Co., 126 Misc. 75 (N.Y. Sup. Ct. Jefferson Cnty. 1925) (setting aside an appraisal award after finding that the appraiser was not disinterested).

\textsuperscript{118} See, e.g., St. Croix Trading Co./Direct Logistics, LLC v. Regent Ins. Co., 370 Wis. 2d 248, 257, 882 N.W.2d 487, 492 (Ct. App. Wis. 2016) (vacating appraisal award after concluding that “the appraisal panel’s consideration of coverage was in direct contradiction of the specific language of the insurance contract”).