HOUSE BILL REPORT
EHB 1128

As Passed House:
January 18, 2018

Title: An act relating to civil arbitration.

Brief Description: Concerning civil arbitration.

Sponsors: Representatives Shea, Jinkins, Holy, Sawyer, Kilduff, Nealey, Hansen, McCaslin, Fitzgibbon, Ormsby and Haler.

Brief History:
Committee Activity:
Judiciary: 1/18/17, 1/26/17 [DP];
Appropriations: 2/6/17, 2/15/17 [DP].
Floor Activity:
Passed House: 2/27/17, 71-25.
Floor Activity:
Passed House: 1/18/18, 77-19.

Brief Summary of Engrossed Bill

- Makes various changes to the mandatory arbitration laws concerning the cases subject to mandatory arbitration, the time periods for setting hearing dates, permitted discovery, arbitrator qualifications, and filing fees.
- Removes all references to the word "mandatory" throughout the mandatory arbitration laws, replacing "mandatory" with "civil" in some instances.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 9 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Frame, Haler, Hansen, Kirby, Klippert, Orwall and Shea.

Minority Report: Without recommendation. Signed by 3 members: Representatives Rodne, Ranking Minority Member; Muri, Assistant Ranking Minority Member; Graves.

Staff: Ingrid Lewis (786-7289).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass. Signed by 28 members: Representatives Ormsby, Chair; Robinson, Vice Chair; Bergquist, Buys, Caldier, Cody, Condotta, Fitzgibbon, Haler, Hansen, Harris, Hudgins, Jinkins, Kagi, Lytton, Manweller, Nealey, Pettigrew, Pollet, Sawyer, Schmick, Senn, Springer, Stanford, Sullivan, Taylor, Tharinger and Volz.

Minority Report: Do not pass. Signed by 2 members: Representatives Stokesbary, Assistant Ranking Minority Member; Wilcox.

Minority Report: Without recommendation. Signed by 2 members: Representatives MacEwen, Assistant Ranking Minority Member; Vick.

Staff: Meghan Morris (786-7119).

Background:

Arbitration is a form of alternative dispute resolution where a neutral third party is selected to hear both sides of the case and then render a specific decision or award.

Authorization.
Mandatory arbitration is required for certain civil actions in counties with a population of more than 100,000. In counties with a population of 100,000 or less, the county legislative authority may authorize mandatory arbitration, or the superior court of the county may authorize it with a majority vote of the county's superior court judges.

Actions Subject to Mandatory Arbitration.
Mandatory arbitration applies to all superior court civil actions where the sole relief requested does not exceed $15,000, or if approved by a two-thirds vote of the superior court judges, up to $50,000. In addition, a majority of the superior court judges may vote to use mandatory arbitration in child support and maintenance cases.

Arbitrator Qualifications.
An arbitrator must be a member of the Washington State Bar Association (WSBA) who has been admitted to practice for a minimum of five years or who is a retired judge. The parties to an arbitration may stipulate to an arbitrator who is not a lawyer.

Mandatory Arbitration Rules.
The Washington Supreme Court is required to adopt rules establishing procedures to implement mandatory arbitration. These procedural rules are known as the Superior Court Mandatory Arbitration Rules (MAR). Under the MAR, the arbitrator must set the time, date, and place of the hearing and give reasonable notice of the hearing date to the parties. The hearing must be scheduled no sooner than 21 days, nor later than 63 days, from the date of the assignment of the case to the arbitrator, except by stipulation or for good cause. With respect to discovery, the court rules provide that a party may demand a specification of damages, request a physical or mental examination of a party, request admissions from a party, and take the deposition of another party, unless otherwise ordered by the arbitrator.

Additional discovery is not allowed unless stipulated to by the parties or ordered by the arbitrator when reasonably necessary.

Decision, Award, and Appeals.
An award by an arbitrator may be appealed to the superior court. The superior court will hear the appeal "de novo," which means that the court will conduct a trial on all issues of fact and law as if the arbitration had not occurred.

Filing Fees.
The fee for filing a request for mandatory arbitration is set by authority of local ordinance and may not exceed $220. This fee must be used solely to offset the cost of the mandatory arbitration program. The fee for filing a request for a trial de novo of an arbitration award is set by authority of local ordinance and may not exceed $250.

Summary of Engrossed Bill:

All references to the word "mandatory" are removed from the mandatory arbitration laws. In some instances, "mandatory" is replaced with the word "civil" to the effect that where the law formerly required "mandatory arbitration," the law now requires "civil arbitration."

Actions Subject to Civil Arbitration.
Superior court judges may require civil arbitration for civil actions with amounts at issue of up to $100,000, increased from a former maximum of $50,000, if approved by a two-thirds vote of the superior court judges.

Civil Arbitration Rules.
Certain procedural rules, similar but not identical to the rules regarding notice of hearing and discovery as provided in the Superior Court Mandatory Arbitration Rules (MAR), are added to statute. The arbitrator shall set the time, date, and place of the hearing and give reasonable notice of the hearing date to the parties. The hearing must be scheduled no sooner than 21 days, nor later than 75 days, from the date of assignment of the case to the arbitrator, except by stipulation or for good cause. With respect to discovery, a party may request a physical or mental examination of a party, request admissions from a party, and take the deposition of another party, unless otherwise ordered by the arbitrator. Additional discovery is not allowed unless stipulated to by the parties or ordered by the arbitrator when reasonably necessary. The differences between the procedural rules added to statute and the MAR are highlighted in the table below:

	MAR	HB 1128
Notice of Hearing	The hearing must be scheduled no sooner than 21 days, nor later than 63 days, from the date of the assignment of the case to the arbitrator, except by stipulation or for good cause.	The hearing must be scheduled no sooner than 21 days, nor later than 75 days, from the date of assignment of the case to the arbitrator, except by stipulation or for good cause.

Discovery	A party may: (1) demand a specification of damages; (2) request a physical or mental examination of a party; (3) request admissions from a party; and (4) take the deposition of another party, unless otherwise ordered by the arbitrator.	A party may: (1) request a physical or mental examination of a party; (2) request admissions from a party; and (3) take the deposition of another party, unless otherwise ordered by the arbitrator.

Arbitrator Qualifications.
A person may not serve as an arbitrator unless the person has completed a minimum of three continuing legal education (CLE) credits approved by the Washington State Bar Association on the professional and ethical considerations for serving as an arbitrator. A person serving as an arbitrator must file a declaration or affidavit stating or certifying to the appointing court that the person is in compliance with the CLE credit requirement. The superior court judge or judges in any county may choose to waive the CLE credit requirement for arbitrators who have acted as an arbitrator five or more times previously.

Decision, Award, and Appeals.
A written notice of appeal of a civil arbitration must be signed by the aggrieved party.

Filing Fees.
The maximum filing fee for a request for civil arbitration is raised from $220 to $250, as established by authority of local ordinance. Of this fee, $220 shall be used to offset the cost of the civil arbitration program, and $30 of each fee must be used for indigent defense services. The maximum filing fee for a request for trial de novo of a civil arbitration award is raised from $250 to $400, as established by authority of local ordinance.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on September 1, 2018.

Staff Summary of Public Testimony (Judiciary):

(In support) This bill has been before the Legislature before. Civil arbitration is a great tool to resolve cases in half the time it would take for a case to go through the trial process. In addition, it is much cheaper because witnesses submit testimony via affidavit and declarations, and you do not have to go through all the procedures in a regular trial. The limit has not been raised in over a decade, so a lot of cases are over the $50,000 threshold but under the $100,000 threshold. The fees need to be upped. This will take some of the burden off of the judge and make it cheaper for people to resolve their issues.

This mandatory arbitration program has proven to be very effective. It was pioneering in the 1980s. Other states have modeled their statutes on this program. Three thousand cases are

taken off the docket per year—three thousand cases that judges never have to hear. Most of the cases are personal injury cases, and through this program, cases get resolved in months rather than years. Increasing the number of cases that go to mandatory arbitration will save money. The program used to pay for itself in user fees, but user fees have not been bumped up in years. This bill is a true win-win for the taxpayers.

This is an access to justice issue. To get an orthopedic surgeon to testify live in court is really expensive. If you do it in arbitration, it is cheaper. The cases at the $100,000 level are not more complex than the $50,000 level. It is just that the cost of medical bills are rising, so the jurisdictional limits should go up. Doing a jury trial takes four to five days, even for a small motor vehicle accident case.

A lot of the cases that get put on the docket for arbitration are resolved before the arbitrator even gets a chance to hear them. Arbitrators really care about the experience of the parties; they try to make sure that the parties are able to submit all their evidence. Most of the time liability has been stipulated to, and what the parties disagree about is the damages. It is not uncommon for arbitrators to have to decide cases that already involve $100,000.

(Opposed) Mandatory arbitration is not the appropriate place for cases with damage awards of up to $100,000. At the $100,000 level, damage awards are more complex. Discovery rules in civil arbitration are not adequate for these complex cases. The limited discovery leaves defendants at a distinct disadvantage. No requests for production are allowed. Defendants have a much shorter amount of discovery time. The bill should remove the increase in the jurisdictional amount. Mandatory arbitration is not appropriate for these higher value, more complex cases.

Mandatory arbitration may not actually be saving that much money for judges because one-third of the cases that go to arbitration come back to the court as de novo cases. The increase in jurisdictional limit from $50,000 to $100,000 represents a 100 percent increase. This is a huge increase.

The defense does better in front of juries rather than in arbitration. Real jurors are not as likely as arbitrators to simply split the difference between what the two parties are asking. Splitting the difference drives claim values high, which is detrimental to the defense. Many arbitrators practice from the plaintiff's side of the bar. One-third of mandatory arbitration cases are currently brought again as a trial de novo. This number would only increase with the jurisdictional increase. Trial de novo means that all the expenses that happened in the arbitration were for nothing, because the judge cannot look at what was decided in arbitration. This simply adds to the cost of the dispute and has the opposite effect of reducing costs.

Cases do get complex at the $100,000 level; $100,000 is a lot of money. Limited discovery is to the detriment of the defense. The gold standard for determining the value of the case is a jury. Arbitrators award higher amounts to plaintiffs than juries do. The bill should keep the limit at $50,000.

The focus should be on access to justice. It should not only be about the cost; it should be about the outcomes. There is a substantial increase in what arbitrators award compared to

what juries award. Arbitrator awards are predictable: they take the midpoint of the plaintiff's claim, give or take a couple thousand. Arbitrators have an incentive to split the award so they can get more business.

This bill will cause the insurance consumers to suffer because arbitration awards raise costs, and that will be passed onto the consumers. Not everyone can afford to have a $300,000 liability insurance policy on their car. It's punishing those who cannot afford a higher liability insurance.

(Other) The bill should strike the $30 increase that goes to indigent defense. The idea that someone who is paying for a civil case should be funding criminal defense does not make sense.

Staff Summary of Public Testimony (Appropriations):

(In support) Mandatory arbitration is a great tool to speed up the court process and save costs. Going through arbitration can cost approximately a quarter to half of the costs of going to trial. The additional revenue will fill a budget hole for indigent public defense, while helping our court system and small businesses.

What slipped through the fiscal note is that 3,000 cases go through the arbitration system every year. That means 3,000 cases never go onto a judicial docket or spend judicial time. That is equivalent to 24 judges, courtrooms, and judicial staff not needed every year, producing a big cost saving. Increasing the arbitration system could even double these numbers, resulting in a true win-win for litigants, the court system, and especially taxpayers. Civil arbitration is an access to justice and fairness program and is a massive success in this state and a model for the country.

Arbitrators give parties the opportunity to share their voices in a system that saves them a tremendous amount of money. Arbitrators can take testimony in the form of written documentation, medical records, or testimony by telephone, which doctors appreciate when they are not seeing patients during their lunch hour. There is a big cost savings to all parties and plaintiffs. Some people think there is an opportunity for arbitrators to build a book of business, but arbitrators are typically chosen randomly and many do not submit the paperwork to be paid. The rates and hour limits are low. Many arbitrators work on a voluntary basis as a way to contribute to dispute resolution processes.

(Opposed) Defense lawyers find they do better in front of real juries and real courts than in front of arbitrators. Arbitrators frequently come to these matters with a "split the difference" mentality and settlements are far more common when a matter is in superior court.

The fiscal note speaks specifically to some concerns: "the experience of the [Office of Attorney General's] Torts Division is that only 26 percent of the current arbitration cases are resolved with no payout to the plaintiff, whereas 60 percent of those in superior court are resolved with no payout." Cases in superior court are frequently dismissed prior to trial, while few cases are dismissed prior to mandatory arbitration. Arbitration is more likely to result in a payout to the plaintiff than in cases that proceed to superior court. There is an assumption that larger arbitration awards will increase incentives for trial de novo, but the

result in a trial de novo is a duplication of access to justice costs, not a replacement. With trial de novo, you get the costs of arbitration and the costs of the appeal of the full trial.

This proposal does not bring access to justice or lesser costs to courts. This bill raises the jurisdiction for more complex litigation with just a few people looking at the case instead of real live juries. These arbitrators may be less accustomed to seeing awards in certain amounts of money for minor injuries. If the jurisdiction is raised from $50,000 to $100,000, those are more complex pieces of litigation. The process of arbitration works because the process is limited, discovery is limited, and the time frame is condensed, so defendants do not have the opportunity to make the best case. It may increase the number of cases brought to the courts.

Persons Testifying (Judiciary): (In support) Representative Shea, prime sponsor; and Larry Shannon, Celia Rivera, and Katherine Mason, Washington State Association for Justice.

(Opposed) Jennifer Campbell and Maggie Sweeney, Washington Defense Trial Lawyers; Mel Sorensen, Property Casualty Insurers Association of America, Allstate, and American Family Association; Cliff Webster, Washington Liability Reform Coalition; Jean Leonard, Washington Insurers, State Farm, and Nationwide; Tom Underbrink, Mutual of Enumclaw; and Jim Skogman, PEMCO Insurance.

(Other) Stephen Warning, Superior Court Judges Association.

Persons Testifying (Appropriations): (In support) Representative Shea, prime sponsor; and Larry Shannon and Katherine Mason, Washington State Association for Justice.

(Opposed) Mel Sorensen, Washington Defense Trial Lawyers; and Jean Leonard, Washington Insurers, National Association of Insurance Companies, State Farm, and Nationwide.

Persons Signed In To Testify But Not Testifying (Judiciary): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.