



# The Arbitration Review of the Americas

2018

**JAMS International**

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Global Arbitration Review is delighted to publish *The Arbitration Review of the Americas 2018*, one of a series of special reports that deliver business-focus intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration. Like its sister reports *The European Arbitration Review*, *The Middle Eastern and African* and *The Asia-Pacific Arbitration Review* provides an unparalleled annual update – written by the experts – on key developments.

In preparing this report, Global Arbitration Review has worked exclusively with leading arbitrators and legal counsel. It is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put theory into context – which makes the report of particular value to those conducting international business in the Americas today.

Global Arbitration Review would like to thank our contributors, who have made it possible to publish this timely regional report.

Although every effort has been made to provide insight into the current state of domestic and international arbitration across the Americas, international arbitration is a complex and fastchanging field of practice, and therefore specific legal advice should always be sought.

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# JAMS International

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JAMS

## Summary

THE INSTITUTION

ARBITRAL PROCEDURE BEFORE JAMS INTERNATIONAL

COMMENTARY ON CERTAIN FEATURES OF THE JIAR

## THE INSTITUTION

Former judge Warren Knight founded JAMS in Southern California in 1979 as a for-profit corporation committed to private resolution of commercial disputes. The company's subsequent national and international expansion now makes it the world's largest private provider of mediation and arbitration services. JAMS remains headquartered in Irvine, California, and comprises 25 offices in North America and London, UK. It maintains an exclusive panel of over 300 full-time neutrals, including retired judges and attorneys with experience in alternative dispute resolution. JAMS neutrals are supported by approximately 200 full-time associates.

While best known as a market-leading mediation provider, domestic and international arbitration comprise some 3,100 case filings and over 30% of revenue. Its reputation as a top-tier source of arbitrators owes much to the vast experience of its panelists and to JAMS' ongoing internal training programmes. All JAMS arbitrators, with very few exceptions are full-time ADR practitioners who no longer practise law, thus assuring strict independence and impartiality. It also bears mention that JAMS does not operate through external committees or advisory groups composed of representatives of major law firms.

JAMS arbitrators sit in cases both administered by JAMS and not administered by JAMS. Many of our panelists are listed on the panels of other major arbitration organisations. Many are fellows of the Chartered Institute of Arbitrators.

All neutrals are vetted prior to joining JAMS and subject to ongoing scrutiny. Party feedback is sought and welcome, both during and after arbitrations. With increasing pressure on time and costs in arbitration, JAMS' close relationship with its neutrals offers a degree of oversight and therefore comfort to parties - whether or not JAMS is administering the case - that the process will be run in an efficient manner, and that awards are delivered in a timely fashion.

Prompt, consensual resolution of disputes is central to JAMS' culture and identity, and stems from long experience administering alternative dispute resolution (ADR) programmes for individuals, corporations and associations. Such ADR programmes are often administered in accordance with special rules, procedures and protocols that include: training of panel and staff; extensive case tracking and reporting; self-imposed quality control; and peer review standards for both professional and administrative services. In partnership with claims administrators and courts, JAMS has also created protocols and administered specialised programmes for handling mass claims arising out of class actions, mass torts and bankruptcies.

JAMS is thus active along the entire spectrum of ADR products and services, and along the entire timeline of a dispute, up to and including the allocation of settlement funds in large-scale matters. Examples include the allocation of an US\$80 million settlement to over 13,000 claimants in: the *Unocal Refinery Litigation*; the adjudication of over 35,000 African American Farmers discrimination claims; and compensation and overtime claims in retail industries, to name a few matters. Many JAMS neutrals serve as court-appointed special masters for settlement or discovery in multi-district and other complex litigations involving pharmaceuticals (eg, *Baycol*, *DES*, *Fen-Phen* and *Zyprexa*), Agent Orange, employment discrimination and government audits.

Among more recent developments in JAMS' history was the launch, in 2011, of JAMS International, a wholly-owned subsidiary of JAMS. Headquartered in London, UK, JAMS

sought to leverage London's status as a leading international dispute resolution destination to oversee complex commercial disputes from around the world. In doing so, its caseload often involves working closely with other regional and global arbitral institutions and neutrals outside of JAMS' panel. JAMS International also serves as the home of the UK panel of independent mediators and international arbitrators who also offer a broad spectrum of ADR products, and are adept at designing bespoke hybrid services as required.

The launch of JAMS International was closely followed in 2012 by the opening of a Resolution Center in Miami, Florida. The move recognised Miami's importance as an international business community and a gateway to delivering ADR services in the CALA (Caribbean and Latin American) region. JAMS continues to expand its CALA presence with the addition of neutrals in Turks & Caicos and Mexico City, the development of a Latin American panel with strong Spanish and Portuguese language skills, and case management services in Mexico City.

### **Types Of Dispute Handled**

JAMS handles multiparty, complex cases in virtually all areas of the law in hearing locations throughout the world. Such matters include: antitrust and competition law; bankruptcy; business; class action; commercial; construction; construction defect; e-discovery; education; employment; engineering and construction; entertainment and sports; environmental; family; financial; franchise; government; healthcare; insurance and reinsurance; intellectual property; landlord/tenant; lender liability; licensing; patents; pharmaceutical disputes; professional malpractice; marital dissolution; mass tort; partnership; personal injury; probate; product liability; public policy; real estate; securities; toxic tort; and trusts and estates matters.

### **Number Of Disputes Handled**

In 2016, JAMS handled a worldwide caseload of just under 14,000 disputes, comprising over 3,100 arbitration filings with the remainder being mediations and hybrid processes. Of these, the international caseload was roughly 230 filings, evenly split between arbitrations and mediations. As of May 2017, the annualised caseload, both domestic and international, continues to grow.

### **JAMS Foundation**

Because JAMS is committed to giving back to local, national and international communities, it established the JAMS Foundation in 2002. The Foundation, funded entirely by contributions from JAMS neutrals and associates, provides grants for conflict resolution initiatives and is now the world's largest funder of dispute resolution programmes and initiatives. The JAMS Foundation has provided more than US\$5 million in grant funding since its inception.

### **JAMS Society**

The JAMS Society was created in 2002 to recognise and support volunteer opportunities and community involvement for JAMS associates at a local, 'hands-on' level. All associates are encouraged to become members of their local society and to collaborate on outreach programmes, or to work individually on a project of their choice. JAMS Society members participate in a diverse array of volunteer activities around the country ranging from cleaning up the environment to improving the lives of children and seniors. JAMS Society members have elected to make a positive change in their communities by participating in projects such as adopt-a-family programmes, AIDS walks, blood drives, clothing drives, delivery of

meals to homebound seniors and other worthwhile endeavours. JAMS neutrals throughout the country provide hundreds of hours of pro bono ADR services to local community organisations, legal associations and non-profits in need of dispute resolution services.

### **Weinstein International Fellowship**

The JAMS Foundation established the Weinstein International Fellowship Program in 2008 to provide opportunities for individuals from outside the United States to visit the US to learn more about dispute resolution processes and practices, and to pursue a project of their own design that serves to advance the resolution of disputes in their home countries. By 2017, 94 individuals representing 72 countries will have participated in the Fellowship Program. The Foundation also established the annual Warren Knight Award and provides a US\$25,000 grant to an organisation that promotes dispute prevention and conflict resolution.

## **ARBITRAL PROCEDURE BEFORE JAMS INTERNATIONAL**

### **Model Clause**

Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules. The tribunal will consist of [three arbitrators][a sole arbitrator]. The seat of the arbitration will be [location]. The language to be used in the arbitral proceedings will be [language]. Judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

### **Arbitrators**

JAMS and JAMS International panellists include some of the most distinguished retired judges and attorneys in Europe and the United States. Most of JAMS' panellists are full-time mediators and arbitrators, which allows for the avoidance of conflicts and ease of scheduling cases. Information about JAMS arbitrators and mediators, including detailed CVs, can be found at [www.jamsinternational.com](http://www.jamsinternational.com) and [www.jamsadr.com](http://www.jamsadr.com).

Appointment of Arbitrators is governed by article 8 of the JAMS International Arbitration Rules (JIAR) which, similarly to the ICC, calls for party appointments. Appointed arbitrators need not be affiliated with JAMS. (All arbitrators, of course, are required to be impartial and independent.) If the parties have not agreed on the number of arbitrators, one arbitrator will be appointed unless JAMS International determines in its discretion that three arbitrators are appropriate because of the size, complexity or other circumstances of the case. If the parties have agreed on a procedure for appointing the arbitrators, that procedure will be followed. If the parties have not agreed, then JAMS will follow a list procedure.

### **Costs, Fees And Other Service Charges**

JAMS arbitrators set their own hourly or daily rate. Fees range from US\$400-900 per hour depending on the arbitrator selected. For matters administered under JAMS International Arbitration Rules, JAMS charges a US\$1,500 per party filing fee payable by the claimant at the commencement of the case. Thereafter, 12 per cent of professional fees are charged for administrative services. Fees are billed as the case progresses and are, therefore,

directly proportional to the amount of professional time devoted to the matter. Professional fees include time spent for hearings, pre- and post-hearing reading and research and award preparation. Administrative fees include: access to an international panel of judges, attorneys and other ADR experts; dedicated services, including all administration through the duration of the case; document handling; and on-site business support, including local phone service, internet access and fax and copying capabilities. Administrative fees (not including conference room rentals) will not exceed US\$100,000. JAMS International reserves the right to adjust this cap for extraordinary cases, after consultation with the parties.

For hearings of one day or less that are cancelled or continued by or upon the application of one or both of the parties 30 days or more prior to the hearing date, fees are 100% refundable except for any arbitrator time reserved. For hearings of two days or more that are cancelled or continued 60 days or more prior to the hearing date, fees are 100% refundable except for any arbitrator time reserved. For hearings that are cancelled or continued inside the cancellation/continuance period, fees are non-refundable. However, the cancellation/continuance policy is set by the arbitrators and therefore may vary. This is because time reserved and later cancelled generally cannot be replaced. In all cases involving non-refundable time, the party causing the continuance or cancellation is responsible for the cancellation charges.

JAMS International will invoice for the fees of all arbitrators, whether or not such arbitrator is affiliated with JAMS International. Receipt of payment for all fees is required prior to the delivery of an arbitration award. JAMS International reserves the right to cancel a hearing if fees are not paid by all parties by the applicable cancellation date and JAMS International confirms the cancellation in writing.

## **COMMENTARY ON CERTAIN FEATURES OF THE JIAR**

### **Provisions On Confidentiality Of Arbitration**

The JIAR, which were substantially revised and republished effective 1 September 2016, address the confidentiality of an arbitration, specifically stating that the Tribunal and the administrator 'will maintain the confidentiality of the arbitration' (JIAR article 17.1). JIAR article 17.2 also provides that the arbitration award, unless otherwise required by law, 'will remain confidential unless all the parties consent to its publication'. However, the JAMS rules do not specifically require the parties to maintain confidentiality of the arbitration.

### **Availability Of Expedited Procedures**

JIAR article 22 provides an Optional Expedited Arbitration Procedure for cases involving less than US\$5 million in which parties can choose a process that limits disclosure. Any party may include a request for such procedure in their arbitration agreement (JIAR article 22.1). If the request is opposed, JAMS International will determine whether the arbitration will be conducted on an expedited basis. Arbitrations conducted under the expedited procedures should take six months to complete.

### **Emergency Relief**

JIAR article 3 provides for emergency relief procedures. A party in need of emergency relief prior to the appointment of a tribunal may notify JAMS International and the parties in writing of the relief sought and the basis for an award of such relief. JAMS International will appoint an emergency arbitrator to rule on the emergency request. In most cases, that appointment will occur within 24 hours of receipt of the emergency application and



any requested advance. Within two business days, or as soon as practicable thereafter, the emergency arbitrator shall establish a schedule for the consideration of the request for emergency relief, affording all parties an opportunity to be heard (by remote means if necessary). The emergency arbitrator will determine whether the party seeking emergency relief has shown that immediate loss or damage will result in the absence of emergency relief and whether the requesting party is entitled to such relief. The emergency arbitrator will enter a reasoned order or award granting or denying the relief.

### **Interim Relief**

JIAR article 32 authorises a tribunal to grant interim relief. The tribunal has the authority, upon request, to grant any interim relief that it deems 'necessary'. Such relief may come in the form of a partial or interim award, and may include injunctive relief, protective measures to conserve property and 'measures to secure the payment of any award that might be rendered'. Such awards are deemed to comply with the requirements of the New York Convention. The tribunal also has the power to require security for any costs that might be incurred if it is subsequently determined that the moving party was not entitled to the interim relief.

### **Consolidation Of Disputes Between The Same Parties And Joinder Of Third Parties**

JIAR article 7 provides for consolidation of disputes and joinder of third parties. JIAR article 7.1 provides the JAMS International administrator with the discretion to decide, 'after consulting with the parties to all proceedings and with the arbitrators, that the new case will be referred to the Tribunal already constituted for the existing proceedings'. The article requires JAMS to 'take into account all circumstances, including the links between the two cases and the progress already made in the existing proceedings'.

Additionally, JIAR article 7.2 provides for disputes arising out of or in connection with multiple contracts to be consolidated into a single arbitration. JIAR article 7.3 is invoked if a third party 'seeks to participate in an arbitration already pending'. In that case, the Tribunal must 'decide on such request, after consulting with all the parties, taking into account all circumstances it deems relevant and applicable' (article 7.3).

### **Time Limits For Rendering Of The Award**

JIAR article 34.1 provides that 'the final award should be rendered within three months' after the dispute is heard by the Tribunal and submitted for decision. 'In most circumstances, the dispute should be heard and submitted to the Tribunal for decision within nine months after the initial preliminary conference.' Id.

### **Treatment Of Costs Of The Arbitration**

JIAR article 37 defines arbitration 'costs' as comprising, among other things, the Tribunal's fees as well as the 'reasonable costs for legal representation of a successful party'. The Tribunal's fees are calculated 'by reference to work done by its members in connection with the arbitration' and 'will be charged at rates appropriate to the particular circumstances of the cases including its complexity and the special qualifications of the arbitrators' (JIAR article 37.2.) Under JIAR article 37.4, the Tribunal is required to 'fix the arbitration costs in its award.' Importantly, under that same article, the Tribunal 'may' apportion costs 'among the parties' if the Tribunal 'determines that such apportionment is reasonable, taking into account the circumstances of the case'.

### Appellate Procedures

JAMS' Optional Arbitration Appeal Procedure applies only upon express agreement. Selection of the appellate arbitrators is left to the parties, but if they fail to reach agreement the assigned case manager is authorised to make the appointments. The appellate panel is mandated to apply 'the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision'.

### Special Or Unusual Features

Consistent with JAMS' high resolution rate in mediating complex business disputes to resolution, JAMS applies a unique 'mediator in reserve policy' for international arbitrations. In doing so, within one week of the commencement of an international arbitration at JAMS or JAMS International, a suggested list of mediators will be sent to the parties. The parties will then be encouraged to select a mediator from the list, who will be placed in reserve during the pendency of the arbitration. The mediator so selected (the mediator-in-reserve) will be available to the parties to assist in settlement negotiations in the event that, at any time in the course of the arbitration proceedings, the parties all agree to enlist the mediator's assistance. There will be no charge to the parties for the appointment of the mediator-in-reserve, and the parties will not incur fees unless and until they choose to utilise the mediator's services.

The mediator-in-reserve is not informed of the parties' selection until and unless the parties decide to request the mediator's services. The parties will not be bound to use the mediator-in-reserve and may, at any time, mutually select another mediator to assist in his or her settlement discussions.

The arbitrators in the proceeding will have no knowledge of the identity of the mediator-in-reserve or whether the parties may have engaged their services at any point in the arbitration proceedings.



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