

**JAMS INSTITUTE**  
**NEW PANELISTS’**  
**ARBITRATION TRAINING WORKSHOP**

**INTRODUCTION**

- 1. Review of best practices and common pitfalls**
  - Repeat player issues in arbitration
  - Time sheet best practices (as it relates specifically to arbitration issues)
  - Orders & Awards – timing, including the timing of dispositive motions
- 2. Knowing your role from Day One.**
  - Understand the clause and what rules apply
- 3. Focusing on administrative rules that may apply to your case**
  - The NAC
- 4. Best practices for non-responsive party cases**
  - Not a “default” proceeding; formalities required

**GETTING STARTED**

- 1. Recent Trends In Complex Arbitrations**
  - Growth of arbitration of commercial matters
    - Willingness of parties, counsel to submit larger, more complex matters
    - Increasing sophistication of counsel and parties in process issues
    - Counsel’s desire in larger cases to make the process more “legalistic” – process is fundamentally more extensive than in the past
  - Suitability for larger, more complex cases – JAMS’ caseload has been transformed by these trends, *e.g.*, IP/Technology/Pharma/class actions
  - Implications for cost of process
- Our central focus – to be “Managerial Arbitrators” (tab 25)
  - Partner in process design
  - Assist parties to achieve optimum process
  - Be attentive, day to day, to the needs of counsel and parties

- Be responsive to issues as they arise (*e.g.*, discovery disputes)
- Demonstrate command of the issues in the case and our role as managers
- Get parties to hearing in appropriate time frame, conduct effective hearing
- Issue timely and competent award
- JAMS Arbitration Practice objectives
  - Arbitrators who have actually read the rules (priceless)
  - Case administration designed to suit larger cases – highly trained case managers; internal CM training and QC
  - Role of arbitrator in helping to shape and effectively manage the process (managerial arbitrator) (starting with preliminary conference – below)
  - Reliable awards and timely completion
    - NAC – post issue review
- Developing a vibrant practice
  - Understand your market (may be slightly different than “JAMS’s Market)
  - JAMS neutrals can sit on any case, not just those administered by JAMS
  - Set yourself up for success (training, preparation, continuing education)
  - Marketing to your targets – marketing staff will assist
  - Each case is a marketing opportunity (each case is a marketing disaster!)
  - Complex case arbitration is a national market – each major case provides opportunities for appointment anywhere in US
- JAMS Rules: Comprehensive; Streamlined; Employment; Engineering and Construction (“GEC”) and International (tabs 13-17)
- Other domestic provider rules – AAA Commercial Rules, CPR Non-Administered Arbitration Rules; CPR Administered Rules
- International providers (ICC, LCIA, ICDR, JAMS International, SIAC, HKIAC, CIETAC) – for another day . . .

## **2. The Prehearing Conference and Order No. 1**

### **a. Preparing for the conference—Rule 16 (tab 4)**

- This is the first and best opportunity to take control of the case

- For a managerial arbitrator there is no more important task
- Verify you have a complete file – review clause, pleadings (Rule 9)
  - Demand for Arbitration (Statement of Claim in Arbitration)
  - Controls scope of arbitration and remedies Rule 9(a)
  - Often if case begins in court, the Complaint is attached to the Demand and becomes the Demand for Arbitration
  - Response and Counterclaims (Rule 9(c)) -- same rules as for Demand
  - OK not to submit Response -- Rule 9(e) deems this a denial
  - Jurisdictional objections to a pleading must be submitted “promptly” or are waived (Rule 9(f)) *see* Rule 11, below
- Representation (Rule 12)
  - Unlike court, anyone may represent anyone in arbitration
  - Corporations need not be represented by counsel
  - This is an example of the inapplicability of many statutes and court rules which implement policies that are intended for courts but which are inapplicable to arbitration (also many sanctions provisions such as FRCP Rule 11); also statutes that prevent suspended entities that have not paid taxes or fees to appear and defend claims – policy to promote payment of taxes but irrelevant to arbitration
  - Be sure the representatives in the pleadings were all included in the disclosure checklist so that you are sure you have no additional disclosures to make (counsel come and go in arbitrations (Rules require notice – Rule 12(b))
  - Continuing disclosures generally
- Arbitrability (discussed in more detail below)
  - enforceable agreement
  - proper parties
  - scope of arbitration
  - Do the names in the agreement agree with the names in the Demand/Response/Counterclaim?
  - Does the claim come within the scope of the Demand/Counterclaim
- Request for Expedited Rules (Rules 16.1, 16.2) (on Demand form)
  - Special procedural rules embedded in Comprehensive Rules
  - The process will be different so you need to pay attention to this in preparing for the conference

- Decide on/distribute agenda v. checklist (tab 4)
  - Agenda and Issues that will be discussed – list of issues you wish the parties to discuss prior to the conference (you might look at Rule 16 items as a start)
  - Draft Order (Tab 5) – You should have a template—Procedural Order No. 1
    - 80 percent is standard – Parties, Counsel, clause, pleadings, arbitrability, discovery, prehearing exchanges, hearing procedure, etc.
    - The rest depends on issues you spot reading the file prior to the conference
- Be a managerial arbitrator! (Tab 25)
- b. At the conference
  - Demonstrate your preparation and command of the subject matter; Role of managerial arbitrator in helping to shape the process
  - Verify parties and representation
  - Verify pleadings that have been/will be filed (Rule 9); need for supplemental Claim/Response (Rule 10)
  - Discuss any arbitrability issues (Rule 11); define process to determine any such issues
  - Discovery discussion: (more on this in next session)
    - Discovery Protocols (tab 9); Know them and ask counsel to familiarize themselves with them
    - Rule 17(a)
    - Depositions (Rule 17(b))
    - Third party summonses (subpoenas); (Tab 10), authority and procedure
    - Preserving testimony (*de bene esse* depositions)
  - Discuss Dispositive Motions (below) (Rule 18)
  - Pre-hearing Information exchange (Rule 20); be alert to the dates
  - Hearing dates: negotiate a fair hearing date based on needs of parties) (Rule 22)
  - Cancellation policy – include in Order 1 as a reminder
  - CaseAnywhere – JAMS platform for document exchange Rule 8(a), (b), (c), (d)
    - Password protected

- Parties upload docs without need to serve anyone directly
  - Email notice of filing allows immediate access to docs by all parties
  - Complete historical case file accessible “anywhere”
  - Very useful and easy to use
  - One qualification – large docs – you might specify in Order 1 that docs of a certain size (particularly if containing tabbed exhibits) also be sent to you by courier/mail
- Exchange of documents if not on CaseAnywhere (Rules 8(e), (f), 14 – no ex parte communications))
    - OK to specify electronic exchange and/or paper filing (or both)
- c. Drafting Order No. 1 - Exercise
- Template (Tab 5)

### **3. Jurisdictional issues (arbitrability)**

- Have a basic understanding of legal principles re arbitrability
  - Existence of enforceable agreement (is the subject matter arbitrable?)
  - Proper parties
  - Scope of arbitration clause
- Broad v. narrow clauses
- Separability – *Prima Paint* (see Arbitration Decisions of Note) (tab 23)
- Delegation – *First Options; Rent-a-Center*
- FAA § 2 – who decides?
  - The effect of court orders
- Arbitrator exceeding power – *vacatur* (FAA § 10)
- Order 1 must state “the claims and counterclaims are arbitrable in this proceeding” **or** you must determine what issues need to be determined to be able to conclude there are no issues of arbitrability
- Written order re arbitrability (carry forward to Award)

## **MANAGING THE PROCESS**

### **4. Managing information exchange and discovery (parties and third parties)**

- Discovery (Rule 17) and Discovery Protocols

- Goal of proportionate discovery
  - Assure that parties have sufficient information to present/defend claims
  - Mastering e-discovery (*see* Discovery Protocols. Tab 9)
- Stipulated protective orders (Rule 26(b))
- Mediating a discovery plan/stipulation
  - Prefer parties to do this on their own, but need you accept any “agreement” they reach?
- Third party discovery
  - Model Federal Arbitration Summons (tab 10)
- Motion practice
  - Quick and decisive resolution process discourages disputes (*See* Discovery Protocols)
  - Keep your eye on the award (avoid denial of access to important documents or explain why that was done)

## 5. Dispositive and other motions -- Rule 18

- Standard for dispositive motions
- Look at Discovery Protocols
- Written orders – award
- Limitations (expedited, streamlined, employment)
- Other common motions
  - Consolidation (Rule 6E-- usually NOT for the arbitrator)
  - Provisional relief
  - Security for costs
  - Changing a claim (Rule 10)
  - Withdrawing a claim (Rule 13)

## 6. The Final Status Conference

- Template (tab 6)
- Exhibits
- Witnesses (Can testimony be taken by Skype or Phone or Video Conferencing?)
- Briefs
- Managing time/identifying constraints
- Motions *in limine*; evidentiary issues
- Opening statements
  - Use of demonstratives
- Closing argument/briefing
- Physical space; electronics; early set-up; war room, etc.
  - Court reporter arrangements Rule 22(k)
  - Ability to play video depositions; display PowerPoints, exhibits

## **7. Tripartite arbitrations (i.e. arbitrations with a panel of 3 arbitrators)**

- Nomenclature: determining your status (Code of Ethics for Arbitrators in Commercial Disputes) (tab 3)
  - A “party” arbitrator may be neutral or non-neutral
  - All arbitrators make disclosures
  - *Ex parte* rules are different for each
- Party appointed neutrals (Rule 7)
- Party appointed non-neutrals (Rule 15(j))
  - Role as a credible intermediary
- Selection/role of the chair (Rule 7)
- Practical considerations affecting tripartite panels

## **MANAGING THE HEARING**

### **1. Time management**

- Are the parties on track to finish on schedule?
- Did they agree in advance to split the time? If so, how track?
- Do the Expedited Procedures apply? (JAMS Rules 16.1 and 16.2)

### **2. The record**

- JAMS Rule 22 (k)
- AAA R-28

### **3. Stipulated facts**

- Should you ask the parties for them?

### **4. Allow testimony by deposition or written statements?**

- JAMS Rule 22(e)
- AAA R-35
- Written direct / live cross

### **5. Rules of Evidence**

- JAMS Rule 22(d)
- AAA R-34

### **6. Controlling the hearing**

- JAMS Rule 22 (a)

### **7. Disruptive parties/counsel**

- Techniques for handling
- Sanctions (JAMS Rule 29) – defer to cost phase?
- Award of fees (Rule 24(f))

**8. Hearing in the absence of a party**

- JAMS Rule 22 (j)
- JAMS Rule 31(b)—What if a party doesn't pay its share of the fees?
- AAA R-31
- Electronic hearings

**9. Controlling examination/cross-examination**

**10. Experts**

- Techniques for working with counsel and experts

**11. Voluminous documents**

- Anticipate issue
- Paring down the volume

**12. Post-Hearing Argument and/or briefing**

**13. Closing the hearing**

- JAMS Rule 22(h)
- AAA R-39

**14. Fees and costs -- see discussion in Award Writing, below**

**AWARD WRITING**

**1. Why write awards?**

**2. Who are awards written for? (For whom are awards written)**

- Parties
- Lawyers
- The court
- JAMS as an institution

**3. Getting assistance from counsel (legitimately)**

**4. Use of legal assistants (tab 7)**

**5. Interim awards (JAMS Rule 24(d), AAA Rule R-47(b)) (tabs 11 and 12)**

- Basis of arbitral power
- Identify claims in dispute – not exceeding power
- Procedural history (explain/describe key rulings)
- Facts (and dealing with credibility issues)
- Analysis
  - Departing from the parties' legal reasoning
- Conclusion



- Remedies and damages
- Fees and costs (determine prevailing party, entitlement to fee award)
- Template for Interim Awards

**6. “Hi-Lo” and “Baseball” (final offer) arbitration (JAMS Rules 32, 33)**

**7. Scheduling and conducting proceedings between Interim and Final Awards**

**8. The Final Award (tab 12)**

- Timing of issuance
  - 30 day rule
  - Applies to Final awards and PFA
  - Close of hearing R 24(a); more time R 22(i)
  - Extensions of time by agreement
- Essential attributes -- checklist (attached as first page in Tab 12)
- Clarity of analysis; clarity of actual award provisions
- Self-contained
- Fees and costs – Key Rules
  - Rule 24 (f) allocate JAMS fees and arbitrator compensation
  - Rule 24 (g) allocate attorneys’ fees and expenses per contract or law
  - NAC memo on this subject -- need for adequate discussion of fee award (tab 22)
- Hearing and determining fees
- Awards in tripartite cases; managing dissents
- “Resolves all issues submitted . . .”
- “Reserving jurisdiction” and *functus officio*
- Getting Paid
  - Hearing close
  - Deposits
  - Estimating time
  - Updating time

**9. Post-Award Process**

- Motions to correct (after interim award; after final award); scope of arbitral power (JAMS Rule 24(i))
- File preservation and destruction

**10. JAMS Optional Arbitration Appeal Procedure (Rule 34 and Tab 19)**  
Pre-Award review under JAMS International Rules

**11. Award writing in tripartite cases**

## **Award Writing Checklist**

1. Not 28 lined paper (for court references only)
2. Identify institutional provider
3. Include Case Number
4. Parties names in full
5. No “Does”; no “et al.”
6. “Claimant,” not Plaintiff
7. “Respondent,” not Defendant
8. Other parties: Counterclaimant; Respondent by Counterclaim
9. “Counterclaim,” not Cross-Claim or anything else
10. Identify counsel (practice varies)
11. Identify arbitrator (practice varies)
12. Identify place of arbitration
13. State date of award
14. Identify Source(s) of arbitral authority – Clause, court order, submission agreement, stipulation, etc.
15. Identify pleadings or other documents that define scope of proceeding
16. Procedural history (best practice)
17. Rulings on pre-hearing issues
  - a. Important discovery disputes particularly where evidence is excluded or where sanctions are awarded
  - b. Arbitrability determinations
  - c. Dispositive motions (reference only if denied, details if granted)
18. What happened in interim or partial final awards (substantially full text)
19. Factual statement
  - a. Not “blow-by-blow”
  - b. Not “you know what happened because you were there”
  - c. Not a summary of the testimony of each witness
  - d. Reasonably concise
  - e. Must support analysis of issues (below)
  - f. Introductory paragraph
  - g. OK to intersperse supplemental facts with legal analysis
20. Analysis
  - a. Who has burden of proof (if not obvious)
  - b. What substantive law governs
  - c. Separate liability and damages sections (usually but not always)
  - d. Be sure to lay out all material issues which support award
  - e. Do not decide case based on case(s) not briefed by the parties
21. Damages
  - a. Equitable relief spelled out in detail (with discussion of arbitral authority if necessary)
  - b. Reasonable basis for determination of amount of compensatory damages
22. Preaward interest
  - a. Source of power (rules, clause, statute)
  - b. Reasonable detail as to calculation of amount

- 23. Fees and costs
  - a. Source of power (rules, clause, statute)
  - b. Reasonable detail as to basis of award, calculation of amount
- 24. Separate “Relief Awarded” section in Final and Partial Final Awards
  - a. Clear statement of who pays and who is entitled to payment
  - b. Clear statement of each element of the relief awarded and specific amount
  - c. No reference to “reservation of jurisdiction” unless a very good reason
  - d. Dealing with post-award interest
  - e. Dealing with last fee deposit in Final Award
- 25. Final Awards
  - a. State that “this award resolves all issues submitted for decision in this proceeding”
  - b. Self-contained (no attachments, no cross-references)
- 26. Timing of issuance
  - a. 30 day rule (Rule 24(a))
  - b. Runs from “close of hearing” per Rule 22(h)
  - c. Right to extend time (Rule 24(a))
  - d. Award is “issued” by delivery to Case Manager (Rule 24(a), (i); fees must be paid for award to be served on parties (Rules 31, 6(c))