



The Arbitration Review of the Americas

2024

**JAMS: Fresh ADR Perspective for New
Challenges**

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The Arbitration Review of the Americas 2024 contains insight and thought leadership from 38 pre-eminent practitioners from the region. It provides an invaluable retrospective on what has been happening in some of Latin America's more interesting seats. This edition also contains an interesting think piece on concurrent delay as well as an excellent pair of reviews of decisions in the US and Canadian courts.

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JAMS: Fresh ADR Perspective for New Challenges

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JAMS

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IN SUMMARY

This article provides a summary of JAMS as a brand and of various aspects of its operation. In addition, we summarise the recently revised JAMS International Arbitration Rules and expand on some of the initiatives that JAMS has instituted to support its international practice.

DISCUSSION POINTS

- Overview of JAMS
 - International arbitral procedure before JAMS
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REFERENCED IN THIS ARTICLE

- JAMS International Arbitration Rules
 - Equal Representation in Arbitration Pledge
 - California Senate Bill 766
 - UNCITRAL Model Law and New York Convention
 - ICCA-NYC Bar-CPR Cybersecurity Protocol
 - New York International Arbitration Center
 - Seoul Protocol on Videoconference
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INTRODUCTION

JAMS provides a comprehensive spectrum of conflict prevention and dispute resolution services to meet the unique needs of today's global business environment. This includes mediation, arbitration and a suite of conflict prevention interventions and resolution options.

The JAMS brand includes:

- Extensive experience: with more than 40 years of experience, JAMS has the institutional know how to resolve the most sophisticated global disputes as well as the agility of an organisation that realises the importance of working with attorneys and their clients to create customised processes that will maximise the dispute resolution outcome.
- Innovative solutions: JAMS mediators apply innovative and creative methods to help parties reach settlement in the most complex and difficult matters. JAMS is one of the first ADR providers to offer a mediator-in-reserve option and an optional appeal procedure for arbitrations.
- Efficient process and reliable outcomes: JAMS provides a diverse selection of arbitration rules and procedures designed to meet parties' needs, including the International Arbitration Rules, Comprehensive Arbitration Rules, the Streamlined

Rules, the Engineering and Construction Rules, the Optional Expedited Arbitration Procedures, the Employment Arbitration Rules, Class Action Procedures and the Optional Arbitration Appeal Procedure. JAMS clause workbooks are available to guide drafting of dispute resolution clauses for commercial contracts, ensuring effective conflict resolution provisions.

- Economic resolution and cost planning: today's volatile litigation landscape necessitates that corporate counsel and litigation teams provide their organisations and clients with a dispute resolution option that helps control legal spend. JAMS offers sophisticated case managers and ADR specialists who utilise fee schedules and case management consultation to help parties manage economic considerations.
- Highly respected neutrals with industry knowledge and subject matter expertise: JAMS features a panel of neutrals who are ADR professionals, including seasoned attorneys with extensive international arbitration experience as counsel formerly practicing in major firms, as well as ex-judges, available to hear these cases. JAMS neutrals have decades of experience and diverse perspectives, and they are trained in efficient case administration and are some of the best legal minds in the world.
- Global reach: through its ADR network, JAMS offers resolution anywhere via best-in-class virtual sessions with JAMS virtual moderators and state-of-the-art international arbitration facilities in several major markets in the United States.

In its inaugural case statistics report, JAMS reported a total of 437 active international cases in 2022, including 241 new cases filed, composed of 50 per cent arbitrations, 47 per cent mediations and 3 per cent other ADR processes. JAMS received 120 new international arbitration filings in 2022, 77 per cent of which were filed under JAMS Arbitration Rules and Procedures, with the remaining number conducted under other arbitration rules. This article will provide a summary of the recently revised JAMS International Arbitration Rules and expand on some of the initiatives that JAMS has instituted to support its international practice.

INTERNATIONAL ARBITRAL PROCEDURE BEFORE JAMS

Model International Clause

The JAMS standard arbitration clause for international commercial contracts is as follows:

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 arbitrators may be entered by any court having jurisdiction thereof.

The JAMS International Arbitration Rules were revised and became effective on 1 June 2021. The revised Rules (article 2.2) recognised the development of electronic systems for case management and other processes and streamlined the filing of requests for arbitration and other pleadings and submissions.

COMMENTARY ON CERTAIN FEATURES OF THE JAMS INTERNATIONAL ARBITRATION RULES

Provisions On Confidentiality Of Arbitration

The JAMS International Arbitration Rules were substantially revised and republished effective as of 1 June 2021. The revised Rules address the confidentiality of arbitration, expressly providing that the parties, the tribunal and the administrator ‘will maintain the confidentiality of the arbitration’ (article 16.1). Article 16.2 also provides that the arbitration award, unless otherwise required by law, ‘will remain confidential, unless all the parties consent to its publication’.

Availability Of Expedited Procedures

Article 21 of the JAMS International Arbitration Rules 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 the procedure in its arbitration agreement (article 21.1).

If the request is opposed, JAMS 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

Article 3 of the JAMS International Arbitration Rules provides for emergency relief procedures. A party in need of emergency relief prior to the appointment of a tribunal may notify JAMS and the parties in writing of the relief sought and the basis for an award of this relief. JAMS 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 will establish a schedule to consider 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 the relief. The emergency arbitrator will then issue a reasoned order or award granting or denying the relief. Any order or award of an emergency arbitrator can be revisited and revised, if deemed appropriate, by the tribunal once appointed.

Interim Measures Of Protection

Article 31 of the JAMS International Arbitration Rules is new. The old Rules authorised a tribunal to grant interim relief, but the revised Rules changed the showing required to obtain this relief. Article 31.2 now aligns with the UNCITRAL standard. It provides that interim relief may be ordered if the requesting party demonstrates, first, that:

harm not adequately reparable by an Award of damages is likely to result if the measure is not ordered and such harm substantially outweighs the harm that is likely to result to the Party against whom the measure is directed if the measure is granted’ and, second, that ‘there is a reasonable possibility that the requesting Party will succeed on the merits of the claim.

This is a major change. The prerequisites for interim measures now do not require a showing of either irreparable harm or likelihood of success on the merits.

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

Article 6 of the JAMS International Arbitration Rules provides for consolidation of disputes and joinder of third parties. Article 6.1 invests JAMS (through its JAMS International Arbitration Committee) 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, article 6.2 of the provides for disputes arising out of or in connection with multiple contracts to be consolidated into a single arbitration. Article 6.3 is invoked if a third party 'seeks to participate in an arbitration already pending', in which case the tribunal (not JAMS) must 'decide on such request, after consulting with all the parties, taking into account all circumstances it deems relevant and applicable'.

Time Limits For Rendering Of The Award

Article 33.1 of the JAMS International Arbitration Rules provides that 'in most circumstances, the dispute should be heard and submitted to the Tribunal for decision within nine months after the initial preliminary conference'. Further, in promoting speed and efficiency, the final award should be rendered within three months after the dispute is heard by the tribunal and submitted for decision. JAMS will scrutinise all awards before issuance.

Treatment Of Costs Of The Arbitration

Article 36 of the JAMS International Arbitration Rules 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' (article 36.2).

Under article 36.4, the tribunal is required to 'fix the arbitration costs in its award'. Importantly, under that same article, the tribunal 'may apportion such costs among the parties' if the tribunal 'determines that such apportionment is reasonable, taking into account the circumstances of the case'.

Appellate Procedures

The JAMS Optional Arbitration Appeal Procedure applies only upon express party 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 usual deferential appellate standard applied under the New York Convention is not applicable. Instead, 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'.

Remote Hearings

Remote hearings are now authorised even over the objection of a party. Hearings may take place at any location, and the tribunal, at its discretion, may require that hearings be conducted by means that permit the participants to be located in different geographical locations.

Arbitrators

JAMS panellists include some of the most distinguished retired judges and attorneys in the United States and Europe. In addition, most 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.jamsadr.com.

The appointment of arbitrators is governed by article 7, which, similarly to the International Chamber of Commerce (ICC), calls for party appointments. Appointed arbitrators need not be affiliated with JAMS. (Consistent with international standards, all arbitrators 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 determines in its discretion that having three arbitrators is 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 approximately US\$400 to US\$2,000 per hour, depending on the arbitrator selected.

For matters administered under the JAMS International Arbitration Rules, JAMS charges a US\$2,000 filing fee payable by the initiating party and 13 per cent of professional fees thereafter for administrative services.

JAMS does not charge fees on an *ad valorem* basis; instead, 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 those for:

- dedicated services, including billing and all other administrative services throughout the duration of the case;
- document handling;
- on-site business support available at any JAMS office, including local phone service, internet access and fax and copying capabilities; and
- on-demand tech support from JAMS virtual front desk, including a JAMS Virtual Moderator to assist throughout the process.

Administrative fees (not including conference room rentals) will not exceed US\$100,000. JAMS reserves the right to adjust this cap for extraordinary cases, after consultation with the parties.

For hearings scheduled for two days or more that are cancelled or continued 60 days prior to the commencement date, arbitrator fees for the reserved hearing time are non-refundable; however, the cancellation–continuance policy is set by the individual 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 will invoice for the fees of all arbitrators, regardless of whether the arbitrator is affiliated with JAMS. Receipt of payment for all fees is required prior to the delivery of an arbitration award. JAMS reserves the right to cancel a hearing if fees are not paid by all parties by the applicable cancellation date.

JAMS INTERNATIONAL ARBITRATION CENTERS

As a result of the appointment of many of its neutrals under JAMS International Arbitration Rules and the rules of other institutions (eg, ICC, International Centre for Dispute Resolution, Singapore International Arbitration Centre, London Court of International Arbitration and Hong Kong International Arbitration Centre), JAMS has been conducting international arbitrations at its major metropolitan city offices for many years.

However, users often demand hearing facilities similar to those offered by other major international arbitration centres. Therefore, JAMS opened specially designed JAMS International Arbitration Centers in New York, Miami, San Francisco, Century City and Los Angeles.

JAMS, in collaboration with local international arbitration practitioners and institutions, recognised the need to promote international arbitration in California. This was in response to the perceived need and the opportunity that Senate Bill 766 (SB766)^[1] would provide, encouraging the practice of international arbitration in California. JAMS is pleased to have a collaboration with New York International Arbitration Center, Inc (NYIAC) at the JAMS New York Resolution Center, which provides excellent arbitration amenities in one of the most popular arbitration seats in the world.

Each centre has been equipped with features that benefit the international arbitration process and may include:

- the ability to conduct hearings in person, hybrid or virtually (with the assistance of moderators and a tech help desk);
- spacious, secure hearing rooms with modular tables for flexible hearing set-ups, plus access to as many breakout rooms as required;
- large LCD monitors and high-quality videoconferencing for remote participants and witness cross-examination;
- complimentary, high-speed wireless and cable internet;
- arbitrator lounges for tripartite proceedings; and
- translation booths and translation capabilities.

TECHNOLOGY

JAMS resolution centres are able to meet the technical demands of modern practice.

JAMS hearing rooms have conferencing facilities over a password-protected network using Zoom or one of the other favoured videoconferencing platforms. An IT specialist is available to assist with technical requirements

Each international arbitration centre has at least one large hearing room. The translation booths in each of the hearing facilities comply with ISO 2603/2016^[2] and have all the technical necessities to conduct a bilingual hearing.

Cybersecurity and data protection are ongoing concerns. JAMS follows a series of protocols to ensure the safe handling of data.^[3] Several initiatives have been introduced, including the ICCA-NYC Bar–CPR Cybersecurity Protocol,^[4] the Seoul Protocol^[5] on Video Conferencing and others.

In 2020, JAMS announced the launch of JAMS Access, a secure online case management platform where neutrals, attorneys and case managers can easily access case information. JAMS Access is provided to JAMS clients at no charge, streamlines the filing and service of documents and facilitates easy communication between parties within ADR cases. The cloud-based solution, which has multiple security layers and uses encryption, is available to users 24 hours a day, seven days a week, and can be accessed on multiple devices, including tablets and smartphones.

JAMS also provides training and education through the JAMS Institute to arbitration practitioners and users on effective data protection measures. The challenge is to ensure that all participants in international arbitration follow those protocols, which is why education and guidance are essential in maintaining protection.

JAMS: 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 has made it the world's largest private provider of mediation and arbitration services.

JAMS remains headquartered in Irvine, California, and comprises 30 offices in North America and London. Our panel includes more than 400 former practising attorneys, ADR professionals and retired judges with proven track records and extensive practice area and industry expertise. JAMS neutrals and clients are supported by approximately 250 associates, including ADR systems design experts and case managers with decades of experience.

JAMS arbitrators sit in both cases administered by JAMS and not administered by JAMS. Many of JAMS's panellists are listed on the panels of other major arbitral institutions. Many are fellows of the Chartered Institute of Arbitrators and members of the College of Commercial Arbitrators.

In partnership with claims administrators and courts, JAMS has also created protocols and administered specialised programmes for handling mass claims arising from class actions, mass arbitrations, mass torts and bankruptcies.

JAMS is, thus, active across the entire spectrum of ADR products and services, as well as along the entire timeline of a dispute, up to and including the allocation of settlement funds in large-scale matters.

Many JAMS neutrals serve as court-appointed special masters for settlement or discovery in multi-district and other complex US litigation in a range of industries.

Types Of Disputes Handled

JAMS handles multiparty, complex cases in virtually all areas of law, including antitrust and competition, bankruptcy, business and commercial, class action, construction, construction defect, e-discovery, education, employment, engineering and construction, entertainment and sports, environmental, family, finance, franchise, government, healthcare, insurance and reinsurance, intellectual property, landlord and tenant, lender liability, licensing, patents, pharmaceutical, professional malpractice, marital dissolution, mass torts, partnership, personal injury, probate, product liability, public policy, real estate, securities, toxic torts, and trusts and estates.

Number Of Disputes Handled

In 2022, JAMS handled a worldwide caseload of over 23,000 active disputes. In its inaugural case statistics report, JAMS reported a total of 437 active international cases in 2022, including 241 new cases filed, comprising 50 per cent arbitrations, 47 per cent mediations and 3 per cent other ADR processes. JAMS received 120 new international arbitration filings in 2022, 77 per cent of which were filed under JAMS Arbitration Rules and Procedures, with the remaining number conducted under other arbitration rules.

DIVERSITY, EQUITY AND INCLUSION

The role of women and the promotion of diversity and inclusion in arbitration, particularly international arbitration, have received a tremendous amount of attention over the past several years.^[6] International arbitration practice has been criticised for the predominance of a relatively narrow demographic. There have been many initiatives to promote women and diverse panels.

To further support this growth, groups such as Arbitral Women,^[7] ADR institutions, multinational corporations, bar associations and global law firms have shown a commitment to increasing diverse representation among counsel and neutrals.

In addition, JAMS was an early supporter of the Equal Representation in Arbitration Pledge,^[8] and was also the first private provider to offer a diversity and inclusion clause for arbitration contracts.

DIVERSITY INITIATIVES: JAMS'S APPROACH

Diversity, equity and inclusion (DE&I) is a core value for JAMS, and it consistently tracks its progress against DE&I goals. While there is room for improvement, 42 per cent of senior management are women, 70 per cent of employees are women and 49 per cent of employees are diverse.^[9] In addition, 32 per cent of JAMS's panel in 2021 were women, which compares favourably with other leading arbitral institutions.

JAMS encourages external stakeholders to endorse and support diversity efforts. As mentioned above, its commitment to diversity is also evidenced by the introduction of a diversity and inclusion clause that can be added to its standard arbitration clause: 'The

parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.’

Its commitment is also demonstrated by its appointment of a director of diversity outreach, who is tasked with leading multiple initiatives to ensure equal representation across the spectrum for both mediators and arbitrators.

JAMS’S COMMITMENT TO THE COMMUNITY AND ADR DEVELOPMENT

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\$11 million in grant funding since its inception.

Weinstein International Fellowship

The JAMS Foundation established the Weinstein International Fellowship programme in 2008 to provide opportunities for individuals from outside the United States to visit the United States to learn more about dispute resolution and to pursue a project of their own design that serves to advance the resolution of disputes in their home countries. By 2020, 145 individuals representing 80 countries had participated in the programme.

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.

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. The members have elected to make positive changes in their communities by participating in projects such as adopt-a- family programmes, AIDS walks, blood drives, clothing drives, meal deliveries to homebound seniors and other worthwhile endeavours.

Endnotes

- 1 SB766 'would permit an individual who is not admitted to practice law in California but who is a member in good standing of a recognized legal profession in the United States or a foreign jurisdiction and is subject to effective regulation and discipline by a duly constituted professional body or public authority to provide legal services in an international commercial arbitration or related proceeding, as specified. Additionally, the bill would subject an individual rendering legal services pursuant to this provision to the disciplinary jurisdiction of the State Bar, and it would direct the State Bar to annually report to the Supreme Court regarding the number and nature of any complaints that it has received against these attorneys and any actions it has taken in response to these complaints.' The full text of SB766 can be found at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB766. ^ [Back to section](#)
- 2 www.iso.org/standard/67065.html. ^ [Back to section](#)
- 3 For more information please go to www.jamsadr.com/online. ^ [Back to section](#)
- 4 The ICCA-NYC Bar–CPR Protocol on Cybersecurity in International Arbitration can be found at www.arbitration-icca.org/publications/ICCA_Report_N6.html". ^ [Back to section](#)
- 5 Details of the Seoul Protocol can be found at www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=172&CURRENT_MENU_CODE=MENU0015&TOP_MENU_CODE=MENU0014. Additional commentary on the Seoul Protocol and post-covid practice is available at www.jamsadr.com/blog/2020/the-seoul-protocol-on-videoconferencing-and-the-coronavirus-pandemic. ^ [Back to section](#)
- 6 www.arbitrationpledge.com. ^ [Back to section](#)
- 7 www.arbitralwomen.org. ^ [Back to section](#)
- 8 www.arbitrationpledge.com. ^ [Back to section](#)
- 9 www.jamsadr.com/diversity. ^ [Back to section](#)



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