

# JAMS EFFICIENCY GUIDELINES

## FOR THE PRE-HEARING PHASE OF INTERNATIONAL ARBITRATIONS

*Effective February 1, 2011*

JAMS, the premier mediation and arbitration provider in the United States, combined with ADR Center in Italy to form JAMS International. Headquartered in London, JAMS International provides mediation and arbitration of cross-border and domestic disputes.

JAMS has always conducted United States-based arbitrations in accordance with internationally accepted standards and practices. However, some non-U.S. parties have expressed concern that if they agree to a United States-based arbitration, they risk United States-style discovery and other unwanted practices of United States courts.

JAMS and JAMS International have adopted the “Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations” to assure parties around the world that an international arbitration before JAMS or JAMS International will be conducted in accordance with internationally accepted standards and practices, and will be a fair, focused and cost-effective proceeding. As used herein, “JAMS International” shall refer to either JAMS or JAMS International, whichever is the administering body.



# THE KEY ELEMENT: AN ARBITRATOR'S SOUND JUDGMENT INFORMED BY AN INTERNATIONAL PERSPECTIVE

While some international cases may have similarities, for the most part each case involves unique facts. As a result, pre-hearing arbitration proceedings, including any pre-hearing exchange of information or taking of evidence, must be adapted to meet the unique characteristics of the particular case. There is no one “correct” approach for all international cases.

Pre-Hearing exchange of information and taking of evidence are collectively referred to in these Guidelines as “Pre-Hearing Disclosure.”

In international arbitrations, documents on which parties intend to rely are exchanged. However, beyond that exchange, there is a strong presumption against Pre-Hearing Disclosure that approaches the scope of discovery that one might expect in a U.S. court. The same presumption applies in JAMS international arbitrations, subject to the considerations discussed in these Guidelines.

Pre-Hearing Disclosure in international arbitrations will be based on the judgment of the arbitrator as regards the applicable rules, industry norms and the expectations and preferences of the parties and counsel. In exercising this judgment, JAMS International arbitrators: (i) produce a protocol for Pre-Hearing Disclosure that is specific and appropriate to the given case and is consistent with the accepted norms of international arbitration practice; and (ii) exercise sound judgment to ensure enough Pre-Hearing Disclosure and evidence to permit a fair result, balanced against the need for an efficient process. Exhibit A to the Guidelines lists factors JAMS International arbitrators consider when imposing limits on disclosure.

## EARLY ATTENTION TO THE PRE-HEARING PROCESS BY THE ARBITRATOR

JAMS understands the importance of establishing the ground rules governing an arbitration in the period immediately following the initiation of the arbitration. Therefore, following appointment, JAMS International arbitrators promptly study the facts and the issues and thus are prepared to preside effectively over the early stages of the case in a way that will ultimately lead to an expeditious, cost-effective and fair process.

JAMS International arbitrators seek to avoid uncertainty and surprise by ensuring that the parties understand at an early stage the basic ground rules for Pre-Hearing Disclosure. Early attention to the scope of such disclosure increases the chance that parties will adopt joint principles of fairness and efficiency before partisan positions arise in the context of specific procedural disputes.

JAMS International arbitrators place the type and breadth of Pre-Hearing Disclosure high on the agenda for the first pre-hearing conference. In-house counsel are encouraged to attend the pre-hearing conference at which Pre-Hearing Disclosure is discussed.

JAMS International arbitrators strive to enhance the chances for limited, efficient Pre-Hearing Disclosure by acting at the first pre-hearing conference to set hearing dates and interim deadlines that the parties are told will be strictly enforced and that, in fact, are thereafter strictly enforced. Where appropriate, JAMS International arbitrators explain at the first pre-hearing conference that document requests:

- should be limited to documents that are directly relevant to significant issues in the case or to the case's outcome;
- should be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and
- should not include broad phraseology such as “all documents directly or indirectly related to.”

In JAMS international arbitrations, the prevailing practice is that depositions are not permitted. Provision of written direct testimony in advance of the witness' appearance at an arbitration hearing can go far in substituting for the deposition procedure, and the parties are encouraged to agree on that procedure. In JAMS international arbitrations, there is a strong presumption against use of the U.S. discovery devices of interrogatories and requests to admit.

In JAMS international arbitrations, when the parties, their counsel or their documents would be subject to different rules or other obligations with respect to things such as privilege, privacy or professional ethics, the arbitrator applies the same rule to both sides where possible giving preference to the rule that provides the highest level of protection.

## **PARTY PREFERENCES**

Overly broad Pre-Hearing Disclosure can result when all of the parties to an international arbitration seek discovery beyond what is needed. This unfortunate circumstance may be caused by parties and/or advocates who are inexperienced in arbitration and conduct themselves in a fashion that is commonly accepted in United States court litigation. In any event, where all participants truly desire unlimited discovery, JAMS International arbitrators will respect that decision, as arbitration is governed by the agreement of the parties.

However, where one side wants broad Pre-Hearing Disclosure and the other wants narrow Pre-Hearing Disclosure, the arbitrator will set meaningful limitations.

## **ARBITRATOR TOOLS**

While JAMS International arbitrators strive to act in a deliberate, judicious fashion, always affording the parties due process, it is also essential that they maintain control of the proceedings and move the case forward to an orderly and timely conclusion. JAMS International arbitrators have many tools that can be used both to ensure the fairness of the proceedings and to prevent disruption in the rare case where one side is not cooperative. Those tools may include, for example, the making of adverse factual inferences against a party that has refused to come forward with required evidentiary materials on an important issue.

## **WRITTEN WITNESS STATEMENTS**

In international arbitrations, the use of written witness statements in lieu of direct testimony ("Witness Statements") is a common, broadly accepted practice. JAMS International arbitrators are receptive to the use of Witness Statements in international arbitrations and take full advantage of the efficiencies that can often be achieved through effective use of such statements. JAMS International arbitrators, however, also require that Witness Statements be furnished to opposing counsel and the arbitrators sufficiently in advance of the witness' appearance to permit proper preparation for cross-examination.

## **E-DISCOVERY**

"E-discovery" is the Pre-Hearing Disclosure of documentary evidence that is stored in electronic form. The use of electronic media for the creation, storage and transmission of information has substantially increased the volume and cost of discovery in cases litigated in U.S. courts.

To be consistent with the prevailing standards governing practice in international arbitration, Pre-Hearing Disclosure of information in electronic form must be narrowly circumscribed in order to protect the efficiency and economy of the proceeding while allowing parties to obtain necessary and pertinent evidence. Narrowing the time fields, search terms and files to be searched, as well as testing for burden, are some of the tools for controlling e-discovery that should be considered.

To address issues pertaining to e-discovery, JAMS International arbitrators are trained to deal with electronic data.

While there can be no single standard for the appropriate scope of e-discovery in all cases, JAMS International arbitrators recognize that an early order containing language along the following lines can be an important first step in limiting such discovery in a large number of cases:

There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.

Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.

Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to the amount in controversy, or to the relevance of the materials requested, JAMS International arbitrators will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.

## **DISPUTES REGARDING PRE-HEARING DISCLOSURE**

Disputes as to Pre-Hearing Disclosure must be resolved promptly and efficiently. In addressing such disputes, JAMS International arbitrators consider use of the following practices, which can increase the speed and cost-effectiveness of the arbitration:

Where there is a panel of three arbitrators, the parties may agree, by stipulation or otherwise, that the Chair or another member of the panel is authorized to resolve discovery issues, acting alone.

Lengthy briefs on Pre-Hearing Disclosure matters should be avoided. In most cases, a prompt discussion or submission of brief letters will sufficiently inform the arbitrator with regard to the issues to be decided.

The parties should negotiate Pre-Hearing Disclosure differences in good faith before presenting any remaining issues for the arbitrator's decision.

The existence of unresolved Pre-Hearing Disclosure disputes should not impede the progress of Pre-Hearing Disclosure in all other areas in which there are no differences.

## **REQUESTS FOR ADJOURNMENTS**

While the arbitrator may not reject a joint application of all parties to adjourn the hearing, such adjournments can cause inordinate disruption and delay, and can substantially detract from the cost-effectiveness of the arbitration. If the request for adjournment is by all parties and is based on a perceived need for further Pre-Hearing Disclosure (as opposed to personal considerations), a JAMS International arbitrator ensures that the parties understand the time and cost implications of the adjournment they seek.

If one party seeks a continuance and another opposes it, then the arbitrator has discretion to grant or deny the request. Factors that affect the exercise of such discretion include the merits of the request and the legitimate needs of the parties, as well as the proximity of the request to the scheduled hearing and whether any earlier requests for adjournments have been made.

## **DISPOSITIVE MOTIONS**

In international arbitration, dispositive motions can cause significant delay and unduly prolong the period for Pre-Hearing Disclosure. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the ground that they raise issues of fact and are inconsistent with the spirit of arbitration. On the other hand, dispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues, such as statute of limitations and defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate or limit the need for Pre-Hearing Disclosure. On balance, a JAMS International arbitrator will consider the following procedure with regard to dispositive motions:

Any party wishing to make a dispositive motion must first submit a brief letter (not exceeding five pages) explaining why the motion has merit and why it would speed the proceeding and make it more cost-effective. The other side would have a brief period within which to respond.

Based on the letters, the arbitrator would decide whether to proceed with more comprehensive briefing and argument on the proposed motion.

If the arbitrator decides to go forward with the motion, he/she would place page limits on the briefs and set an accelerated schedule for the disposition of the motion.

Under ordinary circumstances, the pendency of such a motion should not serve to stay any aspect of the arbitration or adjourn any pending deadlines.

*Note: These Guidelines are adapted from the “New York State Bar Association Guidelines for The Arbitrator’s Conduct of the Pre-Hearing Phase of International Arbitrations” dated November 6, 2010.*

## **EXHIBIT A: RELEVANT FACTORS CONSIDERED BY JAMS INTERNATIONAL ARBITRATORS IN DETERMINING THE APPROPRIATE SCOPE OF PRE-HEARING DISCLOSURE IN INTERNATIONAL ARBITRATIONS**

### **AGREEMENT OF THE PARTIES**

- Agreement of the parties, if any, with respect to the scope of discovery.
- Agreement, if any, by the parties with respect to duration of the arbitration from the filing of the arbitration demand to the issuance of the final award.
- The parties’ choice of substantive and procedural law and the expectations under that legal regime with respect to Pre-Hearing Disclosure.

### **CHARACTERISTICS AND NEEDS OF THE PARTIES**

- The nationalities of the parties, the legal tradition of the parties’ home states and the parties’ expectations with respect to the arbitration process.
- The financial and human resources the parties have at their disposal to support Pre-Hearing Disclosure, viewed both in absolute terms and relative to one another.
- The financial burden that would be imposed and whether the extent of the burden outweighs the likely benefit of the requested Pre-Hearing Disclosure.
- Whether injunctive relief is requested or whether one or more of the parties has some other particular interest in obtaining a prompt resolution of all or some of the controversy.
- The extent to which the resolution of the controversy might have an impact on the continued viability of one or more of the parties.

### **NATURE OF THE DISPUTE**

- The factual context of the arbitration and of the issues in question with which the arbitrator should become conversant before making a decision about Pre-Hearing Disclosure.
- The amount in controversy.
- The complexity of the factual issues.

- The number of parties and diversity of their interests.
- Whether any or all of the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated with the requested Pre-Hearing Disclosure.
- Whether there are public policy or ethical issues that give rise to the need for a limited expansion of Pre-Hearing Disclosure.
- Whether it might be productive to address initially a potentially dispositive issue that does not require Pre-Hearing Disclosure.

## **RELEVANCE AND REASONABLE NEED FOR PRE-HEARING DISCLOSURE**

- Relevance of the requested information to the material issues in dispute or to the outcome of the case.
- Whether the requested Pre-Hearing Disclosure appears to be sought in an excess of caution, or is duplicative or redundant.
- Whether there are necessary witnesses and/or documents that are beyond the tribunal’s subpoena power.
- Whether denial of the requested Pre-Hearing Disclosure would, in the arbitrator’s judgment (after appropriately scrutinizing the issues), deprive the requesting party of what is reasonably necessary to allow that party a fair opportunity to prepare and present its case.
- Whether the requested information could be obtained from another source more conveniently and with less expense or other burden on the party from whom the Pre-Hearing Disclosure is requested.
- To what extent the requested Pre-Hearing Disclosure is likely to lead, as a practical matter, to a case-changing “smoking gun” or to a fairer result.
- Whether Pre-Hearing Disclosure is being used as part of a litigation tactic to place a financial or other burden on the other side and thus coerce a result on grounds other than the merits.
- Whether all or most of the information relevant to the determination of the merits is in the possession of one side.
- Whether the party seeking Pre-Hearing Disclosure is willing to advance the other side’s reasonable costs and attorneys’ fees in connection with furnishing the requested materials and information.

## **PRIVILEGE AND CONFIDENTIALITY**

- Whether the requested Pre-Hearing Disclosure is likely to lead to extensive privilege disputes as to documents not likely to assist in the determination of the merits.
- Whether there are genuine confidentiality concerns with respect to documents of marginal relevance. Whether cumbersome, time-consuming procedures (attorneys’ eyes only, and the like) would be necessary to protect confidentiality in such circumstances.

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