

# JAMS CLAUSE WORKBOOK

## A GUIDE TO DRAFTING DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS

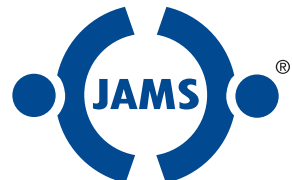
*Effective January 1, 2011*

In today's competitive marketplace, most companies either cannot afford or do not wish to incur the time, expense and adverse business consequences of traditional litigation. Unfortunately, in every business relationship there is the potential for conflict over contractual agreements or business operations. When such conflicts arise, there is no need to incur the onerous expense and delays involved in traditional litigation. There are readily available alternative dispute resolution procedures that will enable you to resolve your disputes relatively quickly, fairly and cost-effectively.

Planning is the key to avoiding the adverse effects of litigation. The optimal time for businesses to implement strategies for avoidance of those adverse effects is before any dispute arises. We at JAMS recommend, therefore, that whenever you negotiate or enter into a contract, you should carefully consider and decide on the procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship. By doing this before any dispute arises, you avoid the difficulties of attempting to negotiate dispute resolution procedures when you are already in the midst of a substantive dispute that may have engendered a lack of trust on both sides.

JAMS offers sample dispute resolution clauses that may be inserted into a contract prior to any dispute ever arising. These sample dispute resolution clauses are set forth and, in some cases, briefly discussed inside.

THE RESOLUTION EXPERTS



**JAMS Clauses for Commercial Contracts can be downloaded in Word or PDF format. For more information on using such clauses, please contact your JAMS Case Manager or call 1-800-352-5267 to reach the JAMS Resolution Center nearest you. Also, if you incorporate any of these clauses into a contract that applies to a number of contracting parties (such as, for example, in a standard employment agreement or in a consumer agreement), please advise JAMS at 949-224-1810 as special requirements may be applicable.**

**By suggesting the contract language contained in this Guide, JAMS is in no way offering legal advice. Rather, the legal effect of the clauses in question should be weighed by the parties in the specific context of whatever law is applicable.**

## STANDARD ARBITRATION CLAUSES

JAMS has standard clauses separately providing for submission of domestic and international disputes to arbitration. While these clauses set forth no details as to procedures to be followed in connection with any such arbitrations, they provide a simple means of assuring that any future dispute will be arbitrated. An additional benefit is that it is sometimes easier for contracting parties to agree to simple, straightforward clauses than to some of the more complex provisions that are set forth in subsequent sections of this Guide. The standard JAMS clauses are set forth below.

### JAMS Standard Arbitration Clause for Domestic Commercial Contracts

*Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS' Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.*

### JAMS Standard Arbitration Clause for International Commercial Contracts

*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/one arbitrator]. The place of 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 in any court having jurisdiction thereof.*

## RESOLUTION PRIOR TO ARBITRATION

It is common practice for a contract clause to provide for negotiation and/or mediation in advance of arbitration. There is much to recommend such clauses because they represent by far the most cost-effective means of resolving a dispute and since, in fact, they often lead to a cost-effective, early settlement. Unless drafted with care, however, such clauses can also have negative side effects since they can be a vehicle for delay and can result in required but empty negotiations where one or all parties have no intention of moving toward a settlement. In JAMS' experience, such downsides can be greatly minimized by setting strict deadlines marking the early ends of the negotiation and mediation periods.

### Clause Providing for Negotiation in Advance of Arbitration

- 1. The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Within 15 days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include with reasonable particularity (a) a statement of each party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within 30 days after delivery of the notice, the executives of both parties shall meet at a mutually acceptable time and place.*
- 2. Unless otherwise agreed in writing by the negotiating parties, the above-described negotiation shall end at the close of the first meeting of executives described above ("First Meeting"). Such closure shall not preclude continuing or later negotiations, if desired.*

3. *All offers, promises, conduct and statements, whether oral or written, made in the course of the negotiation by any of the parties, their agents, employees, experts and attorneys are confidential, privileged and inadmissible for any purpose, including impeachment, in arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation.*
4. *At no time prior to the First Meeting shall either side initiate an arbitration or litigation related to this Agreement except to pursue a provisional remedy that is authorized by law or by JAMS Rules or by agreement of the parties. However, this limitation is inapplicable to a party if the other party refuses to comply with the requirements of Paragraph 1 above.*
5. *All applicable statutes of limitation and defenses based upon the passage of time shall be tolled while the procedures specified in Paragraphs 1 and 2 above are pending and for 15 calendar days thereafter. The parties will take such action, if any, required to effectuate such tolling.*

### **Clause Providing for Mediation in Advance of Arbitration**

*If the matter is not resolved by negotiation pursuant to paragraphs \_\_\_ above, then the matter will proceed to mediation as set forth below.*

### **Or in the Alternative**

If the parties do not wish to negotiate in advance of arbitration, but do wish to mediate before proceeding to arbitration, they may accomplish this through use of the following language:

1. *The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to JAMS, or its successor, for mediation, and if the matter is not resolved through mediation, then it shall be submitted to JAMS, or its successor, for final and binding arbitration pursuant to the clause set forth in Paragraph 5 below.*
2. *Either party may commence mediation by providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested.*
3. *The parties will cooperate with JAMS and with one another in selecting a mediator from the JAMS panel of neutrals and in scheduling the mediation proceedings. The parties agree that they will participate in the mediation in good faith and that they will share equally in its costs.*
4. *All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator or any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.*
5. *Either party may initiate arbitration with respect to the matters submitted to mediation by filing a written demand for arbitration at any time following the initial mediation session or at any time following 45 days from the date of filing the written request for mediation, whichever occurs first (“Earliest Initiation Date”). The mediation may continue after the commencement of arbitration if the parties so desire.*
6. *At no time prior to the Earliest Initiation Date shall either side initiate an arbitration or litigation related to this Agreement except to pursue a provisional remedy that is authorized by law or by JAMS Rules or by agreement of the parties. However, this limitation is inapplicable to a party if the other party refuses to comply with the requirements of Paragraph 3 above.*
7. *All applicable statutes of limitation and defenses based upon the passage of time shall be tolled until 15 days after the Earliest Initiation Date. The parties will take such action, if any, required to effectuate such tolling.*

## **ARBITRATOR QUALIFICATIONS**

It is common for a contract clause to require that one or more of the arbitrators have certain specified qualifications. In drafting such a provision, care should be taken that such necessary qualifications not be too detailed and specific since a highly detailed list of required qualifications can significantly narrow the number of available, competent and qualified arbitrators.

Specification of arbitrator qualifications often works best in the context of a three-arbitrator panel since it is possible in that setting to require that one of the panelists have a certain technical expertise without limiting the entire panel to so narrow an area of experience. In this way, it is possible to ensure that the desired technical expertise is represented on the panel while at the same time assuring that the chair of the panel has extensive experience in the entire arbitration process.

If the arbitration is to be conducted by a sole arbitrator, the contract clause might provide that the arbitrator must be:

1. **A retired judge from a particular court; or**
2. **A lawyer with 10 years of active practice in a specified area, such as construction or computer technology; or**
3. **An accountant; or**
4. **A particular type of engineer.**

If the arbitration is to be handled by a three-arbitrator panel, the contract clause might provide:

1. **That the Chair be an attorney with at least 20 years of active litigation experience; or**
2. **That the Chair be a retired judge from a particular court; or**
3. **That one of the wing arbitrators be an expert in an area such as construction; or**
4. **That the Chair must previously have served as Chair or sole arbitrator in at least 10 arbitrations where an award was rendered following a hearing on the merits.**

*Note: The foregoing are just examples. The point is that the qualifications of the arbitrator(s) should be considered at the time when the contract clause is drafted.*

## PARTY-APPOINTED ARBITRATORS

It is a common practice for each side to appoint an arbitrator and for the two party-appointed arbitrators to then appoint the Chair of the panel. Rule 7(c) of the JAMS Comprehensive Arbitration Rules and Procedures (“JAMS Arbitration Rules”) requires that party-appointed arbitrators “shall be neutral and independent of the appointing Party unless the Parties have agreed that they shall be non-neutral.” Set forth below is a clause that effectively provides for party-appointed arbitrators:

*Within 15 days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two so selected shall select a third arbitrator within 30 days of the commencement of the arbitration. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator within the allotted time, the third arbitrator shall be appointed by JAMS in accordance with its rules. All arbitrators shall serve as neutral, independent and impartial arbitrators.*

### Optional

*Each party shall communicate its choice of a party-appointed arbitrator only to the JAMS Case Manager in charge of the filing. Neither party is to inform any of the arbitrators as to which of the parties may have appointed them.*

## CONFIDENTIALITY

Rule 26 of the JAMS Arbitration Rules provides that JAMS and the arbitrator(s) must maintain the confidentiality of the arbitration proceeding. If it is desired that the parties should also maintain the confidentiality of the proceeding, this can be accomplished with the following language:

*The parties shall maintain the confidential nature of the arbitration proceeding and the Award, including the Hearing, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement, or unless otherwise required by law or judicial decision.*

## GOVERNING LAW

In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), the U.S. Supreme Court held that the Federal Arbitration Act (“FAA”) did not preempt the California Arbitration Act in an interstate dispute where the parties agreed that their contract would be governed by California law. Thus, if the parties wish to ensure that the FAA will apply, regardless of the law that they have specified to govern on substantive issues, the arbitration clause should so provide as follows:

*This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the State of \_\_\_\_\_, exclusive of conflict or choice of law rules.*

*The parties acknowledge that this Agreement evidences a transaction involving interstate commerce. Notwithstanding the provision in the preceding paragraph with respect to applicable substantive law, any arbitration conducted pursuant to the terms of this Agreement shall be governed by the Federal Arbitration Act (9 U.S.C., Secs. 1-16).*

## PUNITIVE DAMAGES

It is not entirely clear whether punitive damages can or cannot be awarded where the dispute resolution clause makes no mention of such damages. See *Garity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354 (1976); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995). Thus, if the parties wish to preclude the arbitrator(s) from awarding punitive damages, they should include specific language to that effect in the dispute resolution clause. The following language accomplishes that purpose:

*In any arbitration arising out of or related to this Agreement, the arbitrator(s) are not empowered to award punitive or exemplary damages, except where permitted by statute, and the parties waive any right to recover any such damages.<sup>1</sup>*

## LIMITATION OF LIABILITY

*In any arbitration arising out of or related to this Agreement, the arbitrator(s) may not award any incidental, indirect or consequential damages, including damages for lost profits.<sup>2</sup>*

## FEES AND COSTS TO PREVAILING PARTY

A “prevailing party” clause such as the following tends to discourage frivolous claims, counterclaims and defenses, as well as scorched earth discovery, in an arbitration:

*In any arbitration arising out of or related to this Agreement, the arbitrator(s) shall award to the prevailing party, if any, the costs and attorneys’ fees reasonably incurred by the prevailing party in connection with the arbitration.*

*If the arbitrator(s) determine a party to be the prevailing party under circumstances where the prevailing party won on some but not all of the claims and counterclaims, the arbitrator(s) may award the prevailing party an appropriate percentage of the costs and attorneys’ fees reasonably incurred by the prevailing party in connection with the arbitration.*

## APPEAL

In *Hall Street Associates v. Mattel Inc.*, the U.S. Supreme Court held that grounds for a court’s vacating an arbitration award under the Federal Arbitration Act (“FAA”) are limited to the unlikely occurrences specified in the FAA, such as “evident partiality,” “fraud,” “corruption,” refusing to hear “pertinent and material” evidence, and acts exceeding the powers of the arbitrators.

Despite *Hall Street*, the option still remains for parties to appeal to a second panel of arbitrators (as opposed to a court) on the basis of traditional legal principles. One such approach that achieves this goal is set forth in the JAMS Optional Appeal Procedure (“Appeal Procedure”), which permits a meaningful, cost-effective, expeditious appeal based on the same legal principles as would have pertained in an appeal following a trial before a court or jury. More particularly, the Appeal Procedure provides:

- That an appeal may be taken to a separate panel of three JAMS arbitrators (or a single arbitrator if the parties so agree).
- That the standard of review will be the “same standard...that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision.”

<sup>1</sup> Article 30.2 of the JAMS International Arbitration Rules and Procedures already precludes an award of punitive damages “unless the parties agree otherwise...[or] unless a statute requires that compensatory damages be increased in a specified manner.”

<sup>2</sup> The law related to limitation of liability clauses varies significantly from jurisdiction to jurisdiction. Parties wishing to include such a clause in a contract should check the applicable law before doing so.

- That a decision will be rendered within 21 days of oral argument or service of final briefs, which will not exceed 25 double-spaced pages.

In order to incorporate the above-described appeal into an arbitration, one need only provide in the dispute resolution clause of a commercial contract that:

*The Parties adopt and agree to implement the JAMS Optional Arbitration Appeal Procedure (as it exists on the effective date of this Agreement) with respect to any final award in an arbitration arising out of or related to this Agreement.*

## MEASURES TO ENHANCE ARBITRATION EFFICIENCY – JAMS OPTIONAL EXPEDITED ARBITRATION PROCEDURES

In recent years, there has been mounting criticism that arbitration has become so costly and time-consuming that the distinction between arbitration and court litigation has become blurred. In response, JAMS acted on January 6, 2010 to adopt **Recommended Arbitration Discovery Protocols for Domestic Commercial Cases** (“JAMS Discovery Protocols”), and on October 1, 2010, it amended the JAMS Arbitration Rules to add Rules 16.1 and 16.2.

Rules 16.1 and 16.2 set forth expedited arbitration procedures that may be incorporated in the dispute resolution clause in the parties’ commercial contract or in a post-dispute Submission to Arbitration. Many of the changes effected by the expedited procedures are based on the JAMS Discovery Protocols. They include:

- A requirement that prior to the first preliminary conference, the parties produce documents pursuant to Rule 17(a) of the JAMS Arbitration Rules.
- Limiting document requests to documents that: (i) are directly relevant to the matters in issue in the case or to the case’s outcome; (ii) are reasonably restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and (iii) do not include broad phraseology, such as “all documents directly or indirectly related to.”
- Limiting E-Discovery as suggested in the JAMS Discovery Protocols.
- Limiting depositions of percipient witnesses to one per side unless it is determined, based on the factual context of the arbitration, that more depositions are warranted. In making any such determination, the Arbitrator shall apply the criteria set forth in the JAMS Discovery Protocols.
- Limiting expert depositions, if any, as follows: Where expert reports are produced to the other side in advance of the hearing on the merits, expert depositions may be allowed only by agreement of the parties or by order of the Arbitrator for good cause shown.
- Requiring the resolution of discovery disputes on an expedited basis.
- Setting a discovery cutoff not to exceed 90 days after the first preliminary conference for percipient discovery and not to exceed 105 days for expert discovery, if any.
- Eliminating the use of dispositive motions except as allowed by the Arbitrator applying the criteria set forth in the JAMS Discovery Protocols.
- Mandating that the hearing on the merits be held on consecutive business days unless otherwise agreed by the parties or ordered by the Arbitrator
- Requiring the hearing to commence within 60 days after the cutoff for percipient discovery. This will typically get a case to hearing no more than 135 days after the first preliminary conference.

A complete copy of Rules 16.1 and 16.2 can be found at <http://www.jamsadr.com/rules-comprehensive-arbitration/>.

If parties wish the complete benefit of Rules 16.1 and 16.2, they can accomplish this by including the following language in the dispute resolution clause of their contract:

*Any arbitration arising out of or related to this Agreement shall be conducted in accordance with the expedited procedures set forth in the JAMS Comprehensive Arbitration Rules and Procedures as those Rules exist on the effective date of this Agreement, including Rules 16.1 and 16.2 of those Rules.*

## MORE LIMITED EFFICIENCY-ENHANCING PROVISIONS

In certain instances, parties may wish to include in their dispute resolution clauses language that is not as comprehensive as that suggested in Rules 16.1 and 16.2, but that will nonetheless facilitate the efficient conduct of any arbitration arising under the Agreement. Examples of such efficiency-enhancing clauses are set forth below.

### Document Requests

*In any arbitration arising out of or related to this Agreement, requests for documents:*

- 1. Shall be limited to documents which are directly relevant to significant issues in the case or to the case's outcome;*
- 2. Shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain; and*
- 3. Shall not include broad phraseology such as "all documents directly or indirectly related to." (See JAMS Discovery Protocols; JAMS Arbitration Rule 16.2).*

### E-Discovery

*In any arbitration arising out of or related to this Agreement:*

- 1. 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.*
- 2. 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 which 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.*
- 3. The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.*
- 4. Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator 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. (See JAMS Discovery Protocols; JAMS Arbitration Rule 16.2).*

### Interrogatories and Requests to Admit

*In any arbitration arising out of or related to this Agreement, there shall be no interrogatories or requests to admit.*

### Depositions

In international arbitrations, the prevailing practice is that depositions are not permitted. But it also is true in international arbitrations that written witness statements are normally used in lieu of oral direct testimony and that these written statements are exchanged well in advance of the hearing on the merits. This procedure can go far in obviating any need for depositions.

In domestic commercial arbitrations, limited depositions of key witnesses can significantly shorten cross-examination and shorten the hearing on the merits. This is the reason why JAMS domestic Arbitration Rule 17(a) provides that each party may take one deposition of another party and may apply to take additional depositions, if deemed necessary.

If not carefully controlled, however, depositions in domestic arbitration can become extremely expensive, wasteful and time-consuming. The following language in a dispute resolution clause of a domestic agreement can enable the parties to enjoy the benefits of depositions while at the same time keeping them well under control:

*In any arbitration arising out of or related to this Agreement, each side may take three (3)\* discovery depositions. Each side's depositions are to consume no more than a total of fifteen (15)\* hours. There are to be no speaking objections at the depositions, except to preserve privilege. The total period for the taking of depositions shall not exceed six (6)\* weeks.*

*Note: The asterisked numbers can of course be changed to comport with the particular circumstances of each case. See JAMS Discovery Protocols; JAMS Arbitration Rule 16.2.*

## Dispositive Motions

In arbitration, “dispositive” motions can cause significant delay and unduly prolong the discovery period. Such motions are commonly based on lengthy briefs and recitals of facts and, after much time, labor and expense, are generally denied on the grounds 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 or defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate the need for expensive and time-consuming discovery.

The issue of dispositive motions can be effectively addressed in the dispute resolution clause by inclusion of the following language:

*In any arbitration arising out of or related to this Agreement:*

- 1. Any party wishing to make a dispositive motion shall 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 shall have a brief period within which to respond.*
- 2. Based on the letters, the arbitrator will decide whether to proceed with more comprehensive briefing and argument on the proposed motion.*
- 3. If the arbitrator decides to go forward with the motion, he/she will place page limits on the briefs and set an accelerated schedule for the disposition of the motion.*
- 4. Under ordinary circumstances, the pendency of such a motion will not serve to stay any aspect of the arbitration or adjourn any pending deadlines.*

## Deadlines for Completion of Arbitration and Interim Phases

*The following time limits are to apply to any arbitration arising out of or related to this Agreement:*

- Discovery is to be completed within \_\_\_ days of the service of the arbitration demand.*
- The evidentiary hearing on the merits (“Hearing”) is to commence within \_\_\_ days of the service of the arbitration demand.*
- At the Hearing, each side is to be allotted \_\_\_ days for presentation of direct evidence and for cross examination.*
- A brief, reasoned award is to be rendered within 45 days of the close of the Hearing or within 45 days of service of post-hearing briefs if the arbitrator(s) direct the service of such briefs.*

*The arbitrator(s) must agree to the foregoing deadlines before accepting appointment.*

*Failure to meet any of the foregoing deadlines will not render the award invalid, unenforceable or subject to being vacated. The arbitrator(s), however, may impose appropriate sanctions and draw appropriate adverse inferences against the party primarily responsible for the failure to meet any such deadlines.*

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JAMS is the largest private alternative dispute resolution provider in the world. With its prestigious panel of neutrals, JAMS specializes in mediating and arbitrating complex, multi-party, business/commercial cases – those in which the choice of neutral is crucial.

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