



# The Arbitration Review of the Americas 2021

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Alston & Bird LLP

Benites, Vargas & Ugaz Abogados

Borden Ladner Gervais LLP

BVI International Arbitration Centre

Center for Arbitration and Mediation of the Chamber  
of Commerce Brazil-Canada (CAM-CCBC)

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A Global Arbitration Review Special Report

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## The Arbitration Review of the Americas 2021

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Pérez Bustamante & Ponce		Benites, Vargas & Ugaz Abogados	

Welcome to *The Arbitration Review of the Americas 2021*, one of *Global Arbitration Review's* annual, yearbook-style reports.

*Global Arbitration Review*, for anyone unfamiliar, is the online home for international arbitration specialists everywhere, telling them all they need to know about everything that matters.

Throughout the year, GAR delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into local developments than our journalistic output is able. *The Arbitration Review of the Americas*, which you are reading, is part of that series. It recaps the recent past and adds insight and thought-leadership from the pen of pre-eminent practitioners from around North and Latin America.

Across 18 chapters, and spanning 120 pages, this edition provides an invaluable retrospective, from 39 leading figures. All contributors are vetted for their standing and knowledge before being invited to take part. Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; has overviews on nascent Brazilian jurisprudence on arbitration and corruption (in the wake of Operation Carwash) and on the coronavirus and investment arbitration, among other things; and an update on how Mexico's federal courts are addressing the problem of personal injunctions against arbitrators that have brought Mexico grinding to a halt as a seat.

Among the other nuggets it contains:

- a discussion of the defences that states may lean on in public law to covid-19 claims. Are we on the verge of a *lex pandemiae* given the likely recurrence of certain questions?
- numerous real-life examples of coronavirus responses in the region that look ripe to found investment arbitration claims;
- extra questions that valuation experts need to ask when assessing a climate change-related loss;
- news that Bolivia may soon return to the investment arbitration fold;
- results of an (informal) survey on attitudes to mediation around Latin America, and whether the region 'needs' the Singapore Convention on Mediation (spoiler alert: not really); and
- a suggestion that the USMCA may not last much past the next round of North American elections, along with a forensic explanation of the changes it has introduced (and has not – for certain industries).

Plus much, much more. We hope you enjoy the review. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to [insight@globalarbitrationreview.com](mailto:insight@globalarbitrationreview.com).

**David Samuels**

Publisher

July 2020

# Overview: JAMS

Robert B Davidson and Matthew Rushton

JAMS

## In summary

This chapter provides an overview of, and commentary on, JAMS's approach to international arbitration, including a review of its rules, caseload and unique features of the institution.

## Discussion points

- The institution:
  - types of disputes handled;
  - number of disputes handled;
  - online and virtual hearings;
  - large-scale ADR programmes;
  - JAMS Foundation;
  - JAMS Society; and
  - Weinstein International Fellowship.
- International arbitration procedure before JAMS:
  - model international clause;
  - arbitrators; and
  - costs, fees and other service charges.
- Commentary on certain features of the JAMS International Arbitration Rules:
  - provisions on confidentiality of arbitration;
  - availability of expedited procedures;
  - emergency relief;
  - interim relief;
  - consolidation and joinder provisions;
  - time limits for rendering the award;
  - treatment of costs;
  - appellate procedures;
  - special or unusual features; and
  - diversity and inclusion.

## Referenced in this article

- JAMS International Arbitration Rules.

## The institution

Former judge Warren Knight founded JAMS in Southern California in 1979 as a for-profit corporation committed to private resolution of commercial disputes. The company's subsequent national and international expansion now makes it the world's largest private provider of mediation and arbitration services. JAMS remains headquartered in Irvine, California, and comprises 28 offices in North America and London (UK). It maintains an exclusive panel of almost 450 full-time neutrals, including retired judges and attorneys with experience in alternative dispute resolution. JAMS neutrals are supported by approximately 250 full-time associates.

While best known as a market-leading mediation provider, domestic and international arbitration comprise close to 40 per

cent of annual revenue. Its reputation as a top-tier source of arbitrators owes much to both the vast experience of its panellists and to JAMS's ongoing internal training programs. All JAMS arbitrators, with very few exceptions are full-time alternative dispute resolution (ADR) practitioners who no longer practice law thus assuring strict independence and impartiality. It also bears mention that JAMS does not operate through external committees or advisory groups composed of representatives of major law firms.

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

All neutrals are vetted prior to joining JAMS, and subject to ongoing scrutiny. Party feedback is sought and welcome. With increasing pressure on time and costs in arbitration, JAMS provides significant and ongoing training opportunities.

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

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

Among more recent developments in JAMS's history was the launch, in 2011, of JAMS in London (UK), which sought to leverage London's status as a leading international dispute resolution destination to oversee complex commercial disputes from around the world. In doing so, its caseload often involves working closely with other regional and global arbitral institutions and neutrals outside of JAMS's panel.

The launch of JAMS in the UK was closely followed in 2012 by the opening of a Resolution Center in Miami, Florida. The move recognised Miami's importance as an international business community and a gateway to delivering ADR services in the CALA (Caribbean and Latin American) region. JAMS continues

to expand its CALA presence, with the addition of neutrals in Turks and Caicos, and Mexico City, the development of a Latin American panel with strong Spanish and Portuguese language skills, and case management services in Mexico City.

#### Types of disputes handled

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

#### Number of disputes handled

In 2019, JAMS handled a worldwide caseload of 17,500 disputes, comprising over 6,500 arbitration filings with the remainder being mediations and hybrid processes. Of these, the cross-border caseload was roughly 380 filings, evenly split between arbitrations and mediations. As of May 2020, the annualised caseload, both domestic and international, continues to grow.

#### Online and virtual hearings

JAMS has a lengthy history of engagement with online dispute resolution, accelerated by the covid-19 pandemic. During lockdown from mid-March to mid-May 2020, JAMS set over 1,000 hearings on various platforms determined by client requirements and preferences. Security and privacy arrangements are rigorously reviewed and followed, and a JAMS moderator is assigned to each proceeding to control entry and troubleshoot technical issues as required.

#### Large-scale ADR programmes

JAMS has extensive experience administering ADR programs of all sizes, including many managed in accordance with special rules, procedures and protocols. JAMS has created numerous specialised facilities for handling mass claims arising out of disasters, including allocation of an US\$80 million settlement to over 13,000 claimants in an oil refinery litigation. We have adjudicated the largest civil rights settlements in US history involving tens of thousands of claims, and have allocated billions of dollars to thousands of claimants in landmark pharmaceutical and medical device mass tort settlements. We have also resolved numerous claims arising from data breaches and other 'single event' instances yielding large numbers of telephonic and paper arbitrations.

#### JAMS Foundation

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

#### JAMS Society

The JAMS Society was created in 2002 to recognise and support volunteer opportunities and community involvement for JAMS associates at a local, 'hands-on' level. All associates are encouraged to become members of their local society and to collaborate on outreach programmes, or to work individually on a project of their choice. JAMS Society members participate in a diverse array of volunteer activities around the country ranging from cleaning up the environment to improving the lives of children and seniors. JAMS Society members have elected to make a positive change in their communities by participating in projects such as adopt-a-family programmes, AIDS walks, blood drives, clothing drives, delivery of meals to home bound seniors and other worthwhile endeavours. JAMS neutrals throughout the country provide hundreds of hours of pro bono ADR services to local community organisations, legal associations and non-profits in need of dispute resolution services.

#### Weinstein International Fellowship

The JAMS Foundation established the Weinstein International Fellowship Program in 2008 to provide opportunities for individuals from outside the United States to visit the US to learn more about dispute resolution processes and practices and to pursue a project of their own design that serves to advance the resolution of disputes in their home countries. By 2019, 115 individuals representing 74 countries had participated in the Fellowship Program. The Foundation also established the annual Warren Knight Award and provides a US\$25,000 grant to an organisation that promotes dispute prevention and conflict resolution.

#### International arbitral procedure before JAMS

##### Model international clause

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

##### Arbitrators

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

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

### Costs, fees and other service charges

JAMS arbitrators set their own hourly or daily rate. Fees range from US\$400–US\$1,200 per hour depending on the arbitrator selected. For matters administered under the JIAR, JAMS charges a US\$1,750 filing fee payable by the initiating party, and 12 per cent of professional fees thereafter for administrative services. Fees are billed as the case progresses and are, therefore, directly proportional to the amount of professional time devoted to the matter. Professional fees include time spent for hearings, pre- and post-hearing reading and research and award preparation. Administrative fees include:

- access to an international panel of judges, attorneys and other ADR experts;
- dedicated services, including all administration through the duration of the case;
- document handling; and
- on-site business support, including local phone service, internet access and fax and copying capabilities.

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

For hearings of one day or less that are cancelled or continued by or upon the application of one or both of the parties 30 days or more prior to the hearing date, fees are 100 per cent refundable except for any arbitrator time reserved. For hearings of two days or more that are cancelled or continued 60 days or more prior to the hearing date, fees are 100 per cent refundable except for any arbitrator time reserved. For hearings that are cancelled or continued inside the cancellation–continuance period fees are non-refundable. However, the cancellation–continuance policy is set by the 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, whether or not 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 and JAMS confirms the cancellation in writing.

### Commentary on certain features of the JIAR

#### Provisions on confidentiality of arbitration

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

#### Availability of expedited procedures

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

### Emergency relief

JIAR article 3 provides for emergency relief procedures. A party in need of emergency relief prior to the appointment of a tribunal may notify JAMS and the parties in writing of the relief sought and the basis for an award of such 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 shall establish a schedule for the consideration of the request for emergency relief, affording all parties an opportunity to be heard (by remote means if necessary). The emergency arbitrator will determine whether the party seeking emergency relief has shown that immediate loss or damage will result in the absence of emergency relief and whether the requesting party is entitled to such relief. The emergency arbitrator will enter a reasoned order or award granting or denying the relief.

### Interim relief

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

### Consolidation of disputes between the same parties and joinder of third parties

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

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

### Time limits for rendering of the award

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

### Treatment of costs of the arbitration

JIAR article 37 defines arbitration ‘costs’ as comprising, among other things, the tribunal’s fees as well as the ‘reasonable costs for legal representation of a successful party’. The tribunal’s fees are calculated ‘by reference to work done by its members in connection with the arbitration’ and ‘will be charged at rates

appropriate to the particular circumstances of the cases including its complexity and the special qualifications of the arbitrators' (JIAR article 37.2). Under JIAR article 37.4, the tribunal is required to 'fix the arbitration costs in its award'. Importantly, under that same article, the tribunal 'may' apportion costs 'among the parties' if the tribunal 'determines that such apportionment is reasonable, taking into account the circumstances of the case'.

#### Appellate procedures

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

#### Special or unusual features

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

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

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

#### Diversity and inclusion

Businesses increasingly recognise that diverse workforces produce better results, and many have robust initiatives to promote inclusivity in terms of gender, ethnicity and sexual orientation. In 2018, JAMS introduced the following clause, modelled after the Equal Representation in Arbitration pledge, to promote diversity while recognising that other qualifications are also important when selecting an arbitrator.

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.




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JAMS offers a comprehensive suite of dispute resolution services ranging from pre-dispute management and dispute systems design to international arbitration, encompassing a broad spectrum of established and bespoke alternative dispute resolution procedures in between.

The JAMS International Arbitration Rules continue to gain market share as JAMS expands its footprint beyond the United States with further resources and facilities in Europe, Asia and South America.

Care is taken to maintain strict standards of independence from law firms and other commercial concerns while offering a diverse and impartial panel of experienced neutrals whose expertise spans most areas of civil and commercial practice. Alongside closely monitored, multilingual case management, JAMS is focused on minimising bureaucracy and providing clients with consistent, dependable service.

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**Robert B Davidson**  
JAMS

Mr Davidson is a retired senior litigation partner of a major international law firm and the executive director of JAMS's arbitration practice. He has been practising full-time as an arbitrator since 2004. He is widely recognised as one of the world's leading international arbitrators and has been consistently ranked as such in *Chambers USA* and *Chambers Global*. Mr Davidson has acted as sole arbitrator, chair or member of a tripartite panel in numerous international arbitrations conducted under the rules of various institutions including CIETAC, the Hong Kong International Arbitration Centre, the ICC, JAMS International, the Netherlands Arbitration Institute, the LCIA, CPR and the ICDR. He has also sat in ad hoc cases conducted under the UNCITRAL Arbitration Rules. A graduate of the University of Pennsylvania's Wharton School and Columbia School of Law, he specialises in complex commercial cases, which include, among others, IP disputes, construction matters and insurance coverage disputes.



**Matthew Rushton**  
JAMS

Matthew Rushton began a career as a legal journalist in 1997 and wrote for periodicals in the UK and the US, including *Legal Business* magazine where he was a senior reporter and litigation editor (2000–2003). As a business journalist he is widely published in magazines and newspapers, including nationals like the *Daily Telegraph*. He is the author of *Writ Large* (2006), a biography of US attorney David I Shapiro.

In 2007, Matthew founded Empirical Publishing, an online legal publisher focused on ADR. Matthew was the publisher of *The Mediator Magazine* and later *The Mediator Directory*, the latter becoming the UK's first national feedback repository for users of commercial mediation. In 2009, Matthew launched an ADR brokerage site, DisputesLoop.com, to bring together ADR users and practitioners.

He joined JAMS in 2011, and is currently EMEA regional director. He holds an undergraduate degree from the University of Manchester, and is completing an MBA at the OU Business School. He is a guest lecturer in international arbitration at Leicester University's LLM course.

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