# JAMS' Expedited Rules: Returning Arbitration to Its Roots

**By Kenneth M. Kramer**

The 1924 passage of the Federal Arbitration Act heralded a new era in commercial dispute resolution. Congress explained that It is practically appropriate that the action [passage of the FAA] should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration if agreements for arbitration are made valid and enforceable. H.R. Rep. No. 96, 68th Cong., 1st Sess., at 2 (1924)

Now, nearly 90 years later, there appears to be a growing consensus that the benefits of arbitration have been squandered and that the arbitration of today does not provide the benefits of speed, efficiency and cost control. The agitation against the costliness and delays of litigation is now directed at arbitration.

The charges include long delays reaching a conclusion, discovery abuses that mirror those in civil court litigation, burgeoning costs driven by E-discovery, motion practice, long hearings and frequent appeals. The result is a bloated dispute resolution process that is expensive, slow and frustrating.

The crescendo of complaint often ignores the undisputed advantages that commercial arbitration retains. Post-hearing process time and costs are likely to be substantially less than court litigation since arbitration awards are more easily enforced and provide fewer avenues for challenge.

It also is true that the parties can pick the decision makers, opting for subject matter experts where useful. And of course, confidentiality is much easier to maintain in arbitration proceedings. Notwithstanding these continuing advantages that might be used to tamp down the calls for reform, the community dedicated to efficient alternative dispute resolution has responded to the call for reform.

In 2009, the College of Commercial Arbitrators, a professional group that promotes best practices, convened a summit on business-to-business arbitration. The goal was to identify why commercial arbitration had become inefficient, slow and costly, and explore concrete, practical steps that could be taken now to remedy them.

The CCA recognized that all of the stakeholders in commercial arbitration would have to participate for a successful outcome to the summit. Therefore, in addition to CCA members and staff, representatives from business users, in-house lawyers, outside counsel and the institutions that provide arbitration services were asked to join in the effort [which included JAMS and *Alternatives'* publisher, the CPR Institute]. Task forces were established, research was undertaken and the summit was convened.

Following much discussion, the CCA published its "Protocols for Expeditious, Cost-Effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions." They are available at www.thecca.net/CCA_Protocols.pdf.

The CCA Protocols provided specfic action directives for the four constituencies: business users and in-house counsel, arbitration providers, arbitration advocates and arbitrators.

## IMPLEMENTING THE PROTOCOLS

For several years prior to the convening of the CCA summit, JAMS has worked on modifications and enhancements to its Rules and Procedures, which were intended to address the same issues that eventually appeared in the Protocols directed at Arbitration Providers. As published by the CCA, those Protocols included offering business users clear options to fit their priorities; promoting arbitration in the context of a range of process choices, including "stepped" dispute resolution processes; developing and publishing rules that provide effective ways of limiting discovery to essential information; offering rules that set presumptive deadlines for each phase of the arbitration; training arbitrators in the importance of enforcing stipulated deadlines; publishing and promoting "fast-track"

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arbitration rules; developing procedures that promote restrained, effective motion practice; and requiring arbitrators to have training in process management skills and a commitment to cost- and time-saving.

Of particular importance was the development of a new set of procedures to expedite arbitrations and eliminate the perceived discovery and motion practice abuses that were blamed for much of the loss of efficiency and explosion in costs.

The JAMS Comprehensive Arbitration Rules and Procedures (available here: www.jamsadr.com/rules-comprehensive-arbitration) have been amended to include two new sections: "Application of Expedited Procedures" and "Where Expedited Procedures are Applicable."

Since arbitration is a creature of consent, the Expedited Procedures cannot be forced on the parties unless they agree. The choice to use the Expedited Procedures can be made in the initial commercial agreement in which the parties agree to submit disputes to arbitration. To do so, the parties must specifically reference the Expedited Procedures in their contract.

If the parties have failed to specify in their initial agreement that the Expedited Procedures are to be used, the claimant when commencing the arbitration can opt in by indicating it wants to use the Expedited Procedures in the demand for arbitration. The respondent is then obligated to indicate whether it agrees to the use of the Expedited Procedures.

A respondent who declines the invitation to use the Expedited Procedures must bring a client or client representative to the first preliminary conference. This allows the arbitrator to discuss the refusal to opt in to the Expedited Procedures, understand the reasons why consent has been refused, and encourage their use if it makes sense to do so.

There will be occasions in which the Expedited Procedures may not give the parties all of the tools they deem necessary to prosecute or defend the claims. But it is important to make sure that the parties have carefully considered the reasons why the Expedited Procedures should not be used, and whether they truly need to incur the expense and delay inherent in full-blown discovery and motion practice.

## PROBLEM AREAS ADDRESSED

Once the Expedited Procedures have been agreed to, the procedures themselves go a long way to solving the complaints that arbitration no longer provides a cost efficient and speedy path to resolving disputes.

Initially, prior to the first preliminary conference, each party is obligated to cooperate in good faith to exchange all documents that are relevant to the claim or defense and will be relied upon in support of their positions, including electronically stored documents.

In addition, the parties must exchange lists of witnesses who may be called to testify, as well as identify experts who may be called to testify and provide expert reports. The parties must confirm to the arbitrator in writing that these obligations have been satisfied.

Thus, by the time that the parties first meet with the arbitrator, much of the work necessary to ensure an expeditious proceeding will have been completed. Rules 16.2 and 17 (a).

If further document demands are necessary, they must be limited in time, scope and subject matter to documents that are directly relevant to the disputed matters. Use of demands, which include the usual "directly or indirectly relating to," are banned, as are extensive definitions and instructions. Rule 16 (b).

## DEALING WITH E-DISCOVERY

As every litigant knows, discovery is where the litigation costs spiral out of control. E-discovery has spawned its own industry, with hundreds of vendors advertising their qualifications to carry out E-discovery in ways that purport to minimize the millions of dollars spent in any complex litigation.

The Expedited Procedures deal with the costs and abuses of E-discovery head on. Rule 16.2 (c). First, searches are limited to sources used in the ordinary course of business. No documents need to be produced from back-up servers, tapes or other media.

Second, absent a showing of compelling need, production of E-documents need only be made using generally available technology "in a searchable format, which is usable by the requesting party and economic and convenient for the producing party." No need to hire the techie gurus to write new programs.

Third, the Expedited Procedures sharply narrow the custodians whose E-files must be searched. The list of custodians must be narrowly tailored to include "only those individuals whose electronic documents may reasonably be expected to

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contain evidence that is material to the dispute." Rule 16.2(c)(iii).

Finally, the arbitrator is given substantial discretion to further limit E-discovery or to shift the costs—subject always to reallocation in the final award—if the costs and burdens are disproportionate to the nature of the dispute or the amount in controversy.

## TACKLING COSTS

JAMS, through its rules, has long sought to control the deposition discovery costs by limiting each side to one deposition, subject, of course, to the arbitrator's discretion to permit further depositions when appropriate need is shown.

The Expedited Procedures seek to reinforce the one deposition limitation by directing the arbitrator to consider the amount in controversy, the complexity of the issues and, more important, whether "the claims appear, on the basis of the pleadings, to have sufficient merit to justify the time and expense associated" with expanded deposition discovery. Rule 16.2(d)(i). See also JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases (Jan. 6, 2010) (available at www.jamsadr.com/arbitration-discovery-protocols).

The Expedited Procedures also tackle the costs of resolving discovery disputes. The parties are encouraged to avoid lengthy briefs and instead submit short letters, meet and confer in good faith and not to seek to delay discovery on all issues because there are disputes as to some. When there is a panel of three arbitrators, the parties are encouraged to agree that one of the arbitrators can resolve discovery disputes acting alone. Rule 16.2(f).

Dispositive motions have long been a controversial aspect of alternative dispute resolution proceedings. The typical lengthy delays occasioned by dispositive motions in court proceedings are antithetical to the spirit of cost-effective and speedy arbitration.

Therefore, the Expedited Procedures default to the expectation that there will not be any dispositive motions. Departure from the default position will only be permitted when the arbitrator decides that such a motion will enhance the arbitration's efficiency. In the usual case, this will mean that the discovery costs will be substantially curtailed.

To justify the filing of a dispositive motion, the party wishing to make the motion must submit a short letter showing that the proposed motion has merit and, if granted, will speed the proceeding and make it more cost effective. Rule 16.2(h); see also JAMS Recommended Discovery Protocols, supra.

Finally, the Expedited Procedures set time parameters designed to ensure a speedy resolution of the dispute. Percipient discovery is to be completed within 75 days of the preliminary conference; expert discovery must be completed within an additional 30 days. The hearing must commence within 60 days after the end of percipient discovery and should continue on consecutive days unless otherwise agreed or ordered by the arbitrator. Rule 16.2(i).

* * *

If the Expedited Procedures are followed with the parties and the arbitrator working together to fulfill their purpose, the charge that arbitration is no better than court litigation will be refuted. But as the College of Commercial Arbitrators recognizes in its protocols, each of the four constituencies—the business users and in-house lawyers, arbitration providers, arbitration advocates and arbitrators—must beserious about the required reforms.

While JAMS has made available procedures that should ensure cost-effective and speedy resolution, ultimately it is the parties working with the arbitrator in good faith that can make the goal a reality.

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