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Interview: JAMS Arbitrator Patricia H. Thompson Shares Procedural, Problem-Solving Benefits Of Arbitration

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Commentary

Interview: JAMS Arbitrator Patricia H. Thompson Shares Procedural, Problem-Solving Benefits Of Arbitration

[Editor's Note: Patricia H. Thompson, Esq., FCIArb, CollArb, is a full-time arbitrator and mediator at JAMS following four decades of experience in litigation. Her profile can be found at https://www.jamsadr.com/thompson/.]

Mealey's International Arbitration Report spoke with Patricia H. Thompson about her professional background and the past and future of international arbitration resolution.

Mealey's: How did you first become involved in arbitration?

Thompson: As a trial lawyer, one of my areas of practice was in construction. Often, construction contracts require disputes to be arbitrated, so in the course of representing my clients I learned how to arbitrate as an advocate. Over the years, as I studied how best to arbitrate, I came to the conclusion that, properly done, it was a valuable alternative to litigation for a number of reasons.

I became convinced that arbitration wasn't supposed to be litigation with paid judges, it was really supposed to be different and better. That attracted me, especially as the older I got, the larger cases I got, the more expensive the cases I got and the more angst my clients had when faced with huge legal fees. I thought this is madness, there's got to be a better way to resolve disputes than just throwing a lot of money at them.

Mealey's: How did you begin working with JAMS?

Thompson: When I retired from my firm, I knew many of the people at JAMS and had previously been approached by JAMS about the possibility of being a neutral. At first, I had declined, because I really loved being an advocate. But about a decade later, I decided to retire for a number of reasons, in part out of a growing dissatisfaction with the litigation process. So, when several people at JAMS suggested I reconsider joining JAMS, it felt like the right thing to do. And it was. I truly love being a neutral.

Since joining JAMS I've tried to offer the parties a better way of resolving disputes in a number of ways — less expensive, more collaborative, flexible and not hidebound with rules and motions, with the participants constantly vexed with one another. I feel very good about being part of that better process; it's a service for which I have been trained and called.

JAMS encourages this better approach with its thoughtfully crafted rules, continual training and discussion of best practices and the fostering of a community among the neutrals so we can be resources for one another. One of the adjectives that some use to describe an effective arbitrator is that of being a "muscular" arbitrator. That's a little too full of testosterone for me. More often, it seems like my role is that of a teacher, someone who says: Look, there's two ways we can do things. We can do things the way we always have, which is the definition of madness: wanting a different result without changing how we act, or we can follow the rules and best practices of arbitration. So, I'm constantly suggesting ways in which the parties can accomplish what they need to accomplish, which is a fair hearing with appropriate due process, but without unnecessary expense and delay. And the expense and delay of litigation comes from unnecessary early motion practice, overly long, overly complicated discovery, even more prehearing motion practice, and then having a crowded docket

so you can't get the case to hearing. None of which is helpful or appropriate in an arbitration. So, I really try to help the parties realize a better way of resolving things.

For example, I just finished five weeks of hearings, two weeks in one case and then three weeks in another case. And in both, as we went along, issues arose that required considerable flexibility. If the parties had been in court, with a busy judge, with hundreds of cases on their docket and motion practice attorneys clamoring for their attention, there is not much a judge could do. But in an arbitration, we could be quite flexible. So, we dealt with a number of unexpected issues with witnesses. One expert suddenly for personal reasons couldn't come on a day he was scheduled. We took witnesses out of turn; we started early and worked late or broke early for the day, when that was appropriate. Another week, we simply agreed to adjourn for a day, due to issues with one of the arbitrators. So, we proceeded over these weeks, by agreement of the parties but with the arbitrators setting the tone, to resolve such scheduling and evidentiary issues for everybody's benefit.

There are also parties who, at the last minute, find exhibits that they didn't know were going to be relevant until they hear a particular witness testify, because in arbitration, there can be surprises. But the arbitrators are free to find ways of balancing the proceedings to be fair for both sides, so it's not a "gotcha" situation. I'd like to think people who have been through that approach to dispute resolution can really see why it's better.

Mealey's: Have you handled many international cases, and do you see any similarities in those cases to your domestic cases?

Thompson: I handled several international disputes as a litigator and have always been interested in international arbitration practice. I have arbitrated a construction case concerning a project in the Virgin Islands, involving non-U.S. companies, and two construction disputes administered in Miami with international parties. While most of my practice involves domestic parties and disputes, I am a Fellow of the Chartered Institute of Arbitrators and a member of the Florida Bar International Section. I have lectured on international arbitration best practices and ethics and know there are a number of issues common to both international and U.S. domestic dispute resolution. One recurring topic concerns the neutrality of arbitrators, such as the emphasis on avoiding implicit bias, how to address the conflicts that come up when arbitrators demonstrate bias during a proceeding and the benefits of having diverse panels. Otherwise, there are widely recognized differences of philosophy and practice concerning discovery, experts and evidentiary issues. Plus, the idea of private appeals is something that's growing in both arenas.

Mealey's: Can you expand on what the private appeals process would look like?

Thompson: Arbitral organizations — such as CPR [International Institute for Conflict Prevention & Resolution], AAA [American Arbitration Association], and JAMS — have promulgated rules for private arbitration appeals, which rules can be used by agreement of the parties in domestic or international arbitrations.

These rules developed because in arbitration, the parties' rights of judicial review are very limited, but there is absolutely no reason why the parties can't agree to have a backstop of a private appeal to trained, experienced appellate judges. That way, parties can give themselves the assurance that in an important case, an arbitrator's rulings will be reviewed — and any material errors corrected. Parties can reserve their appellate rights in an arbitration agreement, or they can simply agree in writing to allow for the right of appeal after an arbitration has started, and, if they want, memorialize their agreement in their initial scheduling order to use a specific set of appellate rules if either party wants to appeal an award.

When applicable, JAMS appellate rules allow either or both of the parties, within a short deadline after entry of an award, to invoke the private right of appeal. Speed is baked into these rules, so there is no long appellate process as in litigation. Instead, JAMS will immediately help the parties choose from among its appellate neutrals. Parties can look for retired appellate judges with experience adjudicating the same substantive legal and factual issues underlying the parties' award. So, if you have a construction case, how great would it be to be sure you're not trying to educate appellate judges on the subject matter as well as the law?

Then, very quickly, the panel is appointed — which can be geographically diverse from the arbitrator or panel that entered the underlying award. I've heard people say a JAMS arbitrator would be reluctant to reverse another JAMS arbitrator. I've interviewed the arbitrators who sit on these panels, and they all say without hesitation, "Are you kidding? We're used to reversing people. That's our job as appellate judges." But if the parties are concerned about this issue, they can appoint an appellate panel who doesn't even know the arbitrator(s) whose award they're reviewing.

Then, the panel and parties will set a very quick briefing schedule; they can have oral argument or not. The parties can even decide on the standard of review; otherwise, the JAMS rules say the award will be subject to the same standard of review as if it were in a court.

Also, under the JAMS appellate rules, the panel does not send the case back to the underlying arbitrator(s) if they find reversible error. Imagine that at the lower level, the arbitrator erred and refused to allow a party certain key evidence. On appeal, a JAMS appellate tribunal will consider the previously excluded evidence and make any new findings and conclusions that result, and then they enter a new award, again, avoiding a major cause of delay in litigation.

There is also a benefit to the parties if the initial arbitrator understands that the parties have reserved their right to appellate review. It has been proven by those who study such things that a decision maker who knows their decision may be subject to review will be more careful in their analysis. An arbitrator who does a more thoughtful job is good for everyone concerned.

So, to sum up, the old criticism of arbitration that the parties are stuck with the award, good, bad or indifferent, is simply not true, as long as the parties reserve for themselves a right of appeal.

Mealey's: Do you think that the standards for arbitrator impartiality are clear enough that arbitrators know what's expected of them and can maintain the confidence of the parties?

Thompson: People articulate the standard differently, but generally, it boils down to this: The arbitrators have a duty to disclose any facts that they know, or easily could have known, that might be reasonably viewed as affecting that arbitrator's partiality or impartiality. What is it that would reasonably be viewed as affecting partiality? It's a reasonable person test, that is, if you knew that I had served on a panel with someone else that is possibly going to be on this panel, you would want to know — did we get along, how did that panel work, what were the issues, did we agree, were we together a long time, did we socialize a lot?

And so consequently, the panelists must disclose social relationships, business relationships and prior work with either the parties, the counsel or a possible panelist. I don't see that standard is the least bit debatable.

The parties and their counsel also have an important role to play on this issue. When they get their list of potential neutrals, they need to be zealous in reviewing all the articles or social media posts by these candidates, the organizations to which the neutrals belong, the reported opinions they authored or appeared, either as an advocate or a judge. We all forget some things we have done, especially decades later, so advocates owe their clients zealous due diligence to investigate their potential neutrals because it's usually too late after the arbitrator enters an award.

Mealey's: What are the trends you're seeing in arbitration cases before you?

Thompson: One area where I am seeing trends is in the area of consumer disputes. There are so many consumer arbitrations. Every bank account or related agreement, every credit card contract, every online contract and every investment account provides for arbitration, and those are typically consumer disputes because these agreements are usually between individuals and companies. And these types of agreements can have common issues of dispute, such as how debts are collected, what interest rates and penalties can be charged and, very often, whether the consumers can engage in class actions. Additionally, prohibitions against class action litigation create interesting problems in arbitration because what happens is the filing of a mass of very similar, small consumer arbitrations.

JAMS is on top of this issue and has fashioned rules and processes for handling these types of "class" action

arbitrations, as well as *pro se* and employment claims. JAMS also has some excellent arbitrators who know how to manage such proceedings. Consumers can benefit from the speed, informality and lack of expense of arbitration as opposed to litigation, which takes longer and is more expensive. In JAMS arbitrations, the consumers can proceed *pro se*, that is without an attorney. Parties to arbitration don't need to have attorneys if they have an arbitrator and arbitral rules that ensure every participant will get a fair shake in a given case. Arbitrators who give equal respect to each party benefit the fairness of the process. So, to people who say, "Oh, how awful and unfair it is to relegate consumers — or employees — to arbitration," I would argue that arbitration is the best way to get a rapid, individually tailored resolution of a person's claim.

Mealey's: About how many cases do you have in general currently?

Thompson: I have 30 open cases on my JAMS case list. My caseload has generally been between 15 and 30, with the exception of when COVID hit, it went down, but in the last two years, it ratcheted back up. I'm blessed with having a good amount of work that runs the gamut of smaller cases, construction cases, commercial insurance and employment cases.

I also have a specialized subset of cases that I am honored to handle. They come from the U.S. Center for Safe Sport and concern disputes about alleged mistreatment of the athletes who participate in the U.S. Olympics or Paralympics. The Center itself investigates such claims and quickly enters decisions on those claims, but under certain circumstances, the person against whom the finding is entered will have the right to a *de novo* appeal before a specially trained JAMS neutral. Because the initial process is so quick and there may be no counsel involved, the Center has designed an appellate process that allows for a *de novo* evidentiary hearing during the appeal, which usually does involve counsel. It's a fascinating, confidential process. I can't share the details of any case, but I feel like I'm part of an effort to ensure that coaches and athletes are not treated unfairly during the process of addressing serious allegations of possible mistreatment. Such allegations have to be addressed swiftly, but they also must be addressed fairly.

This interview has been lightly edited for clarity. ■

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