



Customize your arbitration by comparing arbitration provider rules

JAMS, AAA AND ADR SERVICES: THE LANGUAGE OF RULES THAT MIGHT WARRANT CONSIDERATION IN SPECIFIC SITUATIONS

A contract provision naming a provider may state that an arbitration is *administered* by a particular provider or administered under the *rules* of a particular provider or both. That provision does not preclude the parties from agreeing that another provider's rules will apply.

Since a comprehensive comparison of the various provider rules is not possible here, our focus is on the language of rules that might warrant consideration in specific situations. A comparison of the rules of arbitration providers JAMS, American Arbitration Association (AAA), and ADR Services, Inc. (ADR), as well as the Code of Civil Procedure demonstrates important differences to consider before commencing arbitration. (This article does not apply to UM/UIM arbitrations.)

Commencing an arbitration and payment of administrative fees

Commencing arbitration under JAMS Rule 5, ADR Services Rule 5, and AAA Commercial Rule R-4 have common but important differences. JAMS Rule 5 does not specifically refer to a "Demand for Arbitration" (despite the statement in JAMS Rule 9 that "Claimant's notice of claims is the Demand for Arbitration referenced in Rule 5). ADR Services Rule 5 and AAA refer to the specifics to be included in a demand for arbitration, including the nature of the claims. All the providers require a stipulation to arbitrate, a pre-dispute agreement, or a court order.

All providers' rules require notice of the nature of the claims and counterclaims, as well as provisions for amending the claims. JAMS Rule 9 provides for the notice of claims, while Rule 10 deals with changes in claims. ADR Services' Rules 6 and 7 do so as well. AAA Rule R-5 provides that a claim may be changed at any time before hearing closure or a date established by the arbitrator. However, subparagraph (a) of R-5, reflecting the fee structure of the AAA provides:

Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.

This provision in AAA Rule R-5 raises the issue of the administrative fee, which all providers require to be paid upon filing the claim. Before commencing arbitration, determine whether the fee is based upon the amount of the claim, or some other consideration.

The introduction to the AAA rules states: "The AAA charges a filing fee based on the amount of the claim or

counterclaim." Rule 39 of ADR Services' Rules provides that ADR Services has a nonrefundable initial filing fee, due upon filing of the arbitration," which is not based on the amount of the claim or counterclaim, but is, as of the date of this writing, a flat \$450. JAMS fees are set out on its website. Except for certain employment and consumer matters, JAMS' website states:

For two-party matters, the Filing Fee is \$1,750. For matters involving three or more parties, the filing fee is \$3,000. The entire Filing Fee must be paid in full to expedite the commencement of the proceedings. Thereafter, a Case Management Fee of 13% will be assessed against all Professional Fees, including time spent for hearings, pre- and post-hearing reading and research and award preparation. JAMS also charges a \$1,750 filing fee for counterclaims.

Exchange of information and discovery

Consider whether discovery is needed. If not, Code of Civil Procedure section 1283.05 right to discovery provisions might not be appropriate. (See CAR form Standard Residential Purchase and Sale Agreement.)

Carefully analyze rules relating to information exchange and discovery to determine if they affect the ability to obtain needed information. Code of Civil Procedure section 1283.05 and the provider rules all differ greatly. AAA rule R-22 envisions an arbitrator-managed exchange of information, while both JAMS Rule 17 and ADR Services Rule 21 provide for the parties to cooperate in a good-faith informal exchange of non-privileged information relevant to the dispute or claim, akin to Rule 26 of the Federal Rules of Civil Procedure.

Rules regarding depositions vary as well. AAA Rule R-22 is written in terms of document exchange and is silent on whether depositions may be taken. Code of Civil Procedure section 1283.05 provides the right to conduct depositions, after leave to do so is granted by the arbitrator. Both ADR Services' Rule 21 and JAMS Rule 17 provide for the taking of depositions but differ in scope. The JAMS rule provides for one deposition of the opposing party or of one individual under the opposing party's control. The necessity of additional depositions is decided by the arbitrator based on the reasonable need for the requested information, availability of other discovery options, and the burden of the request on the opposing parties and witnesses. ADR Services Rule 21 gives the arbitrator the authority "to order such discovery, by way of deposition, interrogatory, document

production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.”

ADR Services Rule 21 and JAMS Rule 17 also have provisions relating to discovery in employment claims. The rules differ, however, in that the JAMS rule provides that the parties may take discovery of third parties with the approval of the arbitrator, while the ADR Services rule states that “the parties are entitled to discovery sufficient to adequately arbitrate their claims, including access to essential documents and witnesses, as determined by the arbitrator(s).”

Enforcing parties’ discovery rights is set out in Code of Civil Procedure section 1283.05, which, as mentioned above, is incorporated (with some limitations) into the ADR Services’ rules. Discovery disputes, under both the ADR Services and JAMS rules, are arbitrator decisions.

Summary disposition of a claim or issue

The ability to move for summary judgment may be jeopardized if a hearing date does not allow sufficient time to do so under Code of Civil Procedure section 437c. Arbitrating under the provider rules can eliminate this problem.

The arbitration rules of the AAA, JAMS, and ADR Services all provide for summary judgment. Code of Civil Procedure Section 437c is applicable in arbitration if the parties have not agreed to follow the provider rules. Beware that section 437c requires such a motion to be brought, and the other parties served at least 75 days before the date set for hearing. If summary judgment is contemplated, set a hearing date that allows sufficient time to do so if you are not proceeding under provider rules.

Under AAA Commercial Rule R-33, the arbitrator may “allow the

filing and make rulings on a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.” This provision apparently requires a preliminary determination before a motion is filed. There is no requirement, however, that the motion be filed at any particular time before the hearing. JAMS Rule 18 provides that “the Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue...provided other interested Parties have reasonable notice to respond to the request.” ADR Services’ Rule 23 similarly permits the filing at any time but requires the parties meet and confer about a hearing date, which, absent an agreement on that date, will be decided by the arbitrator. It also provides, “Unless otherwise specified by the arbitrator, the briefing schedule shall comply with the Code of Civil Procedure Section 437c.”

Securing third-party witnesses

Securing third-party witnesses and documents needed for the arbitration hearing through the subpoena process is not impacted by the different provider rules. Under Section 1282.6 of the Code of Civil Procedure, an arbitrator has the authority to issue subpoenas compelling the attendance at the arbitration hearing and for the production of documents. (But see *Aixtron v. Veeco Instruments* (2020) 52 Cal.App.5th 360. This power does not apply to pre-hearing discovery subpoenas in many circumstances.) Subsection (b) of the statute sets out the procedure for the issuance of subpoenas. Although the AAA Commercial Arbitration Rules do not specifically address the subject in a separate rule, section 1282.6 provides the authority for an arbitrator to issue subpoenas.

JAMS (Rule 21) and ADR Services Rule 32, both entitled “Securing

Witnesses and Documents of the Arbitration Hearing,” address the subject. ADR Services’ Rule 32 provides:

The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents pursuant to Code of Civil Procedure Section 1282.6. In the event a party or a subpoenaed person objects to the production of a witness or other evidence, that party or person may file an objection with the arbitrator, who will promptly rule on the objection, weighing both the burden on the producing party and the need of the proponent for the witness or other evidence.

JAMS Rule 21 states that “the subpoena or subpoena duces tecum shall be issued in accordance with the applicable law,” and, in addition, refers to its Rule 19(c), which provides:

The Arbitrator, in order to hear a third-party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena duces tecum to a third-party witness.

The arbitration hearing

The rules of JAMS, AAA, and ADR Services related to the conduct of an arbitration proceeding are fundamentally the same concerning conduct of the actual hearing, although JAMS rule 22 and ADR Services’ Rule 33 are more detailed than AAA Rule R-32. Some of the provisions in the JAMS and ADR Services rules that are not contained in AAA Rule R-32 are simply covered by separate rules. Provisions for reopening the hearing which are not contained in R-32, are contained in AAA Rule R-40, and rules relating to a stenographic record of the proceedings (R-28). All three provide the arbitrator with discretion to conduct all, or parts of the hearing “by alternative means” such as remotely. Both the ADR Services and

JAMS rules specifically provide that the arbitrator may vary the procedures if it is determined “reasonable and appropriate to do so.” (See JAMS Rule 22(a) and ADR Services Rule 33(a).)

Aside from differences in the organization of the rules, all three providers’ rules will allow for hearings to proceed in essentially the same manner. The JAMS and ADR Services’ Rules are more explicit in that they both provide that evidence subject to privileges and work product are to be excluded, while AAA Rule R-34 provides that “the arbitrator shall *take into account* applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.” This might be significant if you anticipate confidentiality or privilege issues. An arbitrator could interpret a rule stating that a privilege is to be “taken into account” to mean that the evidence subject to privilege can still be considered rather than excluded.

Proceeding with the arbitration hearing if the opposing party refuses to participate in the arbitration

If an arbitration is not being conducted pursuant to a court order,

the arbitrator may not have the power to proceed to take evidence and issue an award if a party withdraws from participation in the arbitration, unless the parties have agreed to follow a provider’s rules.

The Rules of ADR Services 33(i), JAMS Rule 19(a), and AAA Commercial Rule 31 all provide that the arbitrator can proceed with the hearing if a party who has withdrawn or otherwise refuses to participate in the arbitration has been given notice and fails to appear. By contrast, section 1282.2(e) of the California Code of Civil Procedure provides that, “*If a court has ordered a person to arbitrate a controversy*, the arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party ordered to arbitrate, who has been duly notified, to appear.” Under this section, if the arbitration is not court ordered, the arbitrator cannot proceed to hearing if a party withdraws or refuses to arbitrate or appear.

Conclusion

Before proceeding to arbitration, consider the extent to which the parties have the discretion to select the rules

under which the arbitration is to be administered. If they have such discretion, carefully analyze which arbitration rules are best suited for the dispute. By doing so, you may be able to avoid unpleasant surprises that could interfere with your client’s goals, both with respect to the result, and the way the arbitration is administered.

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