

# Preliminary Hearing – Information Exchange

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Is the case Ripe?

- Is work in the process of being completed/corrected?
- When will total damages be quantified/quantifiable?



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# Preliminary Hearing – Information Exchange

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## Pleadings Sufficient

Have the competing claims and defenses been sufficiently described and quantified so that the parties and the arbitrator can ascertain what is at issue?

Compensatory damages for material breach and default

vs.

Specific sums/costs incurred to correct defective work, complete work, bond liens over and above unpaid contract balance at time of termination for default.



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# Preliminary Hearing – Discovery

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## Document Production

- Arbitration Hold - Agreement to preserve all paper and electronic documents
  - Exchange of specific document demands or voluntary exchange
  - Limitation on requests
  - Build in a timeframe for parties to bring disputes concerning document demands to the arbitrator for resolution
  - “Clawback Agreement” – return of inadvertently produced privileged documents with preservation of confidentiality and privilege.
  - Necessity of Confidentiality Agreement – financial records
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# Voluntary Exchange of Documents

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## JAMS Rule 17(a)

- Parties conduct a voluntary and informal exchange of documents and other information immediately after commencement of the Arbitration.
- Parties complete an initial exchange of all relevant, non-privileged documents, within twenty-one (21) calendar days after all pleadings or notice of claims have been received.
- Arbitrator may modify at the Preliminary Conference.

# Preliminary Hearing – EDiscovery

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## Scope and Cost of EDiscovery

- Need for proportionality to amount in controversy
- Search criteria – persons, project, keywords, date range
- Storage sources – servers, individual hard drives, laptops, phones, tablets
- Need for Consultants
- Cost sharing/shifting
- Production in native format with all metadata
- ESI Order



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# Preliminary Hearing – Other Discovery

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## Interrogatories

- Not typically utilized in arbitration.

## Depositions

AAA

- No provision in regular track rules
- In Large Complex Track Cases – at arbitrator’s discretion in “exceptional cases.”

JAMS

- Each party allowed two depositions of other party or individual under other party’s control.
- Arbitrator has discretion to allow additional depositions.



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# Site Visit

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Is a site visit required

- Document/photograph existing conditions, materials on site
- Expert Investigation/Evaluation
  - Testing
  - Measurement
  - Destructive Probes



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# Prehearing Motions

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## Procedural Motions

### AAA R. 38

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

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# Procedural Pre-Hearing Motions

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- Discovery disputes – compel production; request sanctions (AAA R-25)
- Assert New/Different Claim – AAA R-6(b) and JAMS Rule 10 require arbitrator's consent to assert a new or different claim after arbitrator is appointed.
- Stay arbitration
- Preclude a claim as outside scope of agreement, but only if agreement confers such authority on the arbitrator; otherwise, the application must be to a court pursuant to N.J.S.A. 2A:23B-5.



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# Procedural Pre-Hearing Motions

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**Courts generally decide whether an issue is arbitrable.**

"[i]n the absence of an express contract provision conferring authority on the arbitrator, it is uniquely within the province of the courts, and not arbitrators, to make the initial and threshold determination regarding the arbitrability of a particular issue."

Laborers' Local Union Nos. 472 & 172 v. Interstate Curb & Sidewalk, 90 N.J. 456, 463, 448 A.2d 980, 984 (1982)

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# Pre-Hearing Motion for Injunctive Relief

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- Injunctive relief – e.g. turn over materials in storage
- Emergency Injunctive Relief – e.g., preserve existing conditions until inspection, testing, documentation etc.

AAA R-39 sets forth a procedure to seek injunctive relief before an arbitrator or panel is appointed.



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# AAA R-39 Emergency Relief

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## AAA R-39 (b) Written Application for Emergency Relief

- Nature of relief sought
- Why relief required on an emergency basis
- Reasons for Entitlement to such relief
- Certify notice to all other parties or good faith efforts



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# Procedural Pre-Hearing Motions

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## AAA R-39 (c)-(h) Emergency Arbitrator

- Single arbitrator appointed within one business day of application
  - Immediate disclosure of circumstances likely to affect impartiality
  - Challenges to appointment must be made within one business day of disclosure
  - Arbitrator to establish schedule within two business days of appointment
  - Arbitrator may grant emergency relief via interim order or award upon showing of immediate and irreparable loss or damage if relief not granted
  - Award may be modified upon changed circumstances and may require security
  - Judicial application for emergency relief remains available
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# Dispositive Pre-Hearing Motions

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## AAA R-34

- Must make prior written application to arbitrator
- Motions that dispose of all or part of a claim, or narrow the issues in a case.

## JAMS Rule 18

- Arbitrator permission required
- If motion requested by one party, without agreement of all interested parties, other parties must have reasonable notice and opportunity to respond to the request.



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# Dispositive Pre-Hearing Motions

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- Statute of Limitations - accrual considerations
- Claim barred by failure to abide contract requirements respecting notice, timing, declaration of default
- Remedy not permitted by contract, e.g., reciprocal waiver of consequential damages – home office overhead, profit on work not performed, etc.
- Damages sought not incurred by party to arbitration agreement



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# Stipulation of Uncontested Facts

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- Agreed upon Change Orders
- Disputed Change Orders
- Amount Paid
- Contract Duration
- Substantial Completion
- Duration of Specific Delay
- Responsibility for Specific Delay
- Compensability of Specific Delay
- Notice Received





# Disclosure of Witnesses/Experts

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Critically important for Arbitrator's conflict checking and disclosure

- Name only those individuals reasonably anticipated to be called as witnesses