

POINTS TO BE COVERED IN PRELIMINARY HEARING

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Draft to be Adapted to the Individual Case

Following are some general topics/points to be covered in preliminary hearings, subject to the needs of the particular case:

- **Purpose:**
 - Purpose of preliminary hearing – _____
- **Arbitration speech:**
 - Discussion with counsel about how arbitration is supposed to be different – _____
 - Discovery – _____
 - Motion practice – _____
 - Pre-hearing disputes – _____
- **Proportionality:** – _____
 - Amount at issue in this case – _____
 - Claims – _____
 - Counterclaims – _____
 - Specific discussion of the appropriate limits of this case in light of proportionality – _____
 - Discovery – _____
 - Motion practice – _____
 - Pre-hearing disputes – _____
- **Applicable arbitration rules:**
 - Commercial rules – _____
 - Employment rules – _____
 - ICDR rules – _____
 - Large and complex case rules
- **Applicable law:**
 - Substantive law – _____
 - Arbitration law – _____
- **Issues raised by the arbitration clause:** – _____
 - Special requirements:
 - Step clause
 - ????
 - Any issues as to arbitrability – _____
 - Objecting party's motion as to same – _____
 - Responding party's papers as to same – _____
- **The Parties' descriptions of their respective views of the world with respect to the case and how it should be administered** – _____

- **Amendments of Pleadings:**
 - Whether amendments of pleadings are indicated, and, if so, whether reliance documents should be attached to them – _____
 - Date for amended pleadings (complaint/answer) – _____
 - Date for opposing papers – _____
 - Date for reply papers – _____
 - Documents to be attached to each – _____
- **Particularizations:**
 - Whether particularizations of alleged claims and/or damages are indicated – _____
 - And, if so:
 - Opening particularization by (Claimant/Respondent) – _____
 - Corresponding particularization by (Claimant/Respondent) – _____
 - Response to particularizations by (Claimant/Respondent) – _____
 - Response to particularization by (Claimant/Respondent) – _____
 - Date for particularizations of claims – _____
 - Date for particularization of damages – _____
 - Whether documents are to be attached – _____
- **Possible substantive motions:** – _____
 - Procedure to be followed:
 - generally, exchanges of letter briefs of 3-5 pages as to why hearing the proposed motion would foster the expeditious, economical, and fair administration of the case
 - generally, with the case proceeding in the ordinary course in the meantime, subject to what makes sense on the facts of the particular case
 - schedule as to same
 - date for initial letter of proponent – _____
 - opposing papers – _____
 - reply papers – _____
 - oral argument as to same – _____
 - cut-off date for substantive motions – _____
- **Confidentiality:**
 - As to documents – _____
 - As to the entire proceeding as a whole – _____
 - Date for submission of proposed stipulation of confidentiality to be so ordered or to submit any dispute concerning same to the Tribunal – _____
 - **Things to avoid in the stip:**
 - Binding the arbitrator – arbitrator is bound under the AAA rules and ethical rules – _____
 - Binding the AAA -- same – _____
- **Discovery Master:**
 - Whether the Chair will serve as Discovery Master or the entire Panel will hear discovery and routine administrative matters – _____
 - Chair to do it – _____

- Entire Panel to do it – _____
- **Reliance Documents:**
 - Whether the production of reliance documents makes sense in place of, in advance of, or along with normal document production – _____
 - Date for submitting reliance documents – _____
 - Date for any responses to reliance documents – _____
- **Witness Statements:**
 - Whether sworn witness statements, with reliance documents attached, will be used in the case, in whole or in part, in lieu of direct testimony – _____
 - Date for the parties' deciding whether they wish to use witness statements – _____
 - Date for submitting witness statements – _____
 - Date for submitting responsive witness statements – _____
- **Document Production:** Schedule for document production, if any, including for the following:
 - Document requests – _____
 - Responses and objections – _____
 - Counsels' meeting and conferring on objections – _____
 - Privilege logs, if any – _____
 - Production of uncontested documents – _____
 - Possibility of use of generic descriptions in the logs – _____
 - Letter briefs to the Discovery Master or the Panel concerning any discovery disputes – _____ and _____
 - Schedule for argument of any discovery disputes before the Discovery Master or Panel – _____
- **Client Files:** The expectation that Counsel will familiarize themselves as to how their clients' files are maintained and as to how discovery can best be managed, including electronic discovery – _____
- **Discussion of how electronic discovery can be most effectively managed in the case, including with respect to such matters as:**
 - Date for counsel to meet and confer on the subject – _____
 - Date for conference call with the Discovery Master or Panel if it would be helpful – _____
 - Search terms – _____
 - The possible testing of search terms – _____
 - Hit counts – _____
 - Time periods – _____
 - Custodians – _____
 - Format in which documents will be produced – _____
 - The possible use of predictive coding – _____
 - Possible communications among each side's electronic search experts – _____
 - Other points relating to electronic discovery that are of concern on the facts of the particular case – _____

- **General approach as to submissions to the Tribunal:** General procedure to be followed before submitting a detailed letter brief to the other side:
 - Meet and confer first– _____
 - Confirm in any communication to the Tribunal that such meeting and conferring has taken place – _____
- **Timetable for communications among counsel and to the Tribunal:** Turnaround time concerning communications from either side
 - Response by the other side – within 24 hours – _____
 - Response by the Arbitrator – within 24 hours thereafter – _____
 - Subject to faster turnaround, if needed– _____
- **Extensive written application to be avoided as possible:** General point as that many matters may be handled by conference call with the Arbitrator without substantial written submissions
- **Other discovery**, if any – _____
 - **Interrogatories** – _____
 - **Requests to admit** – _____
 - **Offers of Proof** – _____
- **Non-party subpoenas:** – _____
 - Dates for submitting discovery subpoenas to the Tribunal– _____
 - Date for submitting hearing subpoenas to the Tribunal – _____
 - General rule – 3 business days for the other side to respond before the Tribunal will sign – _____
- **Cooperation of parties as to non-party witnesses:** Expectation that parties will exert best efforts to make non-parties over whom they have influence available for discovery or testimony in the case, where such non-parties have relevant and material documents or information – _____
- **Cut-off date for fact discovery** – _____
- **Experts:** – _____
 - Identification of areas of expert testimony on issues as to which a party has the burden of proof – _____
 - Identification of each side's anticipated expert witnesses on issues on which a party has the burden of proof – _____
 - Identification of rebuttal expert testimony – _____
 - Identification of each side's anticipated expert witnesses on other issues – _____
 - _____
 - Date for experts' reports on issues as to which a party has a burden of proof – _____
 - _____
 - Date, where applicable, for reply experts' reports – _____
- **Status conferences:** – _____
 - _____
 - _____
 - _____
 - _____
- **Possible Stipulated Facts:** – _____

- **Summaries, Chronologies and Dramatis Personae:** – _____
- **Witness lists:** Identification of witnesses, including as follows:
 - Their present business affiliations – _____
 - Their anticipated areas of testimony – _____
 - Mode of testimony – _____
 - In person – _____
 - By videoconference – _____
 - By telephone – _____
 - By deposition testimony, whether videotaped or not – _____
- **Hearing exhibits,** including as follows: – _____
 - Date for the Parties' exchanges of exhibits to be offered – _____
 - Date for counsels' meeting and conferring to agree on joint exhibits and avoid duplication – _____
 - Finalization of joint exhibits and of each side's identification of its other exhibits and – _____
 - Organization of exhibits binders by category or chronology or the like, as makes sense in the case – _____
- **Key Exhibits** – _____
- **Demonstrative exhibits** – _____
- **Pre-hearing memoranda** – _____
- **Motions in limine** – _____
- **The hearing:**
 - When – _____
 - Where – _____
 - Hours – _____
 - Particular focus on length of hearing day – _____
 - Panel's approach to evidentiary, administrative, timing, and other matters – _____
- **Evidentiary nature of designated hearing exhibits,** including as follows:
 - The most typical approach: exhibits to be received into evidence as of the opening of hearing, unless objected to in advance thereto or – _____
 - The more restrictive approach, whereby only documents actually used at the hearing are deemed in evidence – _____
 - Clarification that foundations for the admission of documents need not ordinarily be laid and – _____
 - Decision as to whether pre-marking applies to documents used for impeachment only – _____
- **Provision to arbitrators of copies of cases and other authorities relied upon:** – _____
 - Hard copies – _____
 - Electronic copies – _____
- **Accelerated Exchange Program** – _____
- **Form of the Parties' submissions** to the Arbitrators, whether by electronic and/or hard copies – _____
- **Word copies of submissions,** including briefs and experts' reports

- **Use of electronics at hearings** – _____
- **Post-hearing submissions, including:**
 - Post-hearing memoranda and – _____
 - Closing statements and possibly schedule as to same – _____
- **Form of award:** – _____
 - Standard – _____
 - Reasoned – _____
 - Reasoned lite and – _____
 - Findings of fact and conclusions of law – _____
- **Court reporter** – _____
- **Cyber security** – _____
 - Discuss – _____
 - Areas of focus – _____
 - Means of exchanging documents and other materials – _____
 - Paper only – _____
 - Email – _____
 - What requirements as to type of programs – _____
 - What requirements as to whether emails are to be encrypted – _____
 - Means of storing it – _____
 - Means of using it – _____
 - Means of disposing of it – _____
 - What to do with the passwords – _____
 - Need to constantly change the password – _____
- **Level of cyber securities sensitivity and whether special measure should be taken** – _____
 - Communications with the Panel
 - Submissions to the Panel
 - Exhibits
 - Transcripts
 - Anything else
- **Length of time by which I may destroy the case files**
 - Hard copies other than pleadings
 - Exhibits and transcripts from the hearing
 - Electronic copies of same
- **Costs and attorneys' fees, including:** – _____
 - Whether to be handled through post-hearing declarations and computer sheets as to attorney time – _____
 - Or in a separate process after the merits of the case are decided by interim award or the like – _____
- **Parties' ongoing duty of disclosure as to conflicts** – _____
- **Mediation window** – _____
- **Document retention** – _____
- **Parties' expectations** – _____

- Anything else either side or any panel member wants to raise – _____