NAME OF TRIBUNAL/SET OF RULES

In the Matter of the Arbitration between

The XXX Corporation
Claimant ("XXX")
and
YYY Company, Inc.
Respondent ("YYY")

ORDER REGARDING PRELIMINARY HEARING AND DEVELOPMENT OF SCHEDULING ORDER

A preliminary hearing in this case under the [Name] Rules has been set in this Case. This preliminary hearing will be conducted [by phone conference; at location]. Party representatives are invited to participate if they wish. The following is ordered regarding the preliminary hearing and scheduling order in this Case.

Preparation for and conduct of preliminary hearing

1. Prior to the preliminary hearing, counsel for the Parties will confer phone to determine the extent to which they agree or disagree about the appropriate responses to the questions or issues identified in Annex A ("Issues"). This phone conference among counsel is to facilitate a more effective schedule in this case. We recognize that a Party may need to adjust its thinking about these issues during the telephonic preliminary hearing with the Panel.
2. Prior to a discussion of the Issues at the Conference and to provide context, each Party may make a 10-15 minute statement of its position on the disputed issues in the Case.

Preparation of a scheduling order

3. The Panel will participate in the preliminary hearing regarding the Issues and other matters raised by counsel. Thereafter, the Panel will send to the Parties a draft unsigned Scheduling Order ("Draft").
4. Within 10 days of receipt of the Draft, the Parties will:
   4.1. Confer via email or phone to discuss the Draft.
   4.2. Submit copy of the Draft with proposed changes (either joint or individual) in MS Word track changes. Any areas of disagreement will be noted in the Parties' joint response.
5. The Panel will thereafter issue a signed Scheduling Order.

Preservation of relevant documents and things

6. The Panel reminds the Parties that, with the assistance and advice of counsel, they should ensure the preservation of all relevant documents and things including any electronically stored information. This obligation continues throughout this proceeding.

BY THE UNDERSIGNED ARBITRATOR WITH CONSENT OF THE FULL PANEL

Joseph P McMahon		
Date: xxx		

Annex A

Hearing nature and duration.

1. How many days do you believe are needed for the hearing in this case? Must the hearing dates be consecutive dates?

Hearing dates

2. What amount time (in months) is needed to prepare for the hearing?
3. What are the earliest dates you suggest for a hearing in this case? Please provide multiple sets of proposed dates.

Identification of claims and affirmative defenses

4. Are all claims (claims and counterclaims referred to as "claims") that will be included in the scope of this case identified in the demand and response?

    4.1. What are the XXX claims?

        4.1.1. A

        4.1.2. B

    4.2. Are the claims stated in appropriate detail?

    4.3. Are attorney fees claimed? If so, state the basis therefor.

5. If any change or addition of claims is desired, at what point must those claims be identified?
6. What are the affirmative defenses or avoidances on which evidence will be presented? For example accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver. The Response includes:

    6.1. A

    6.2. B

    6.3. C

Damages and method of calculation

7. Has the Claimant/counterclaimant provided a detailed statement of claimed damages and explanation of how damages were calculated?

Note to counsel: the statement of damages, where appropriate, should distinguish the various types of damages (e.g., general/direct damages, special/compensatory damages, liquidated damages, punitive/multiple damages, damages based in statute or other damages (fees, costs, prevailing party, etc.).

8. If not, on what date can such be provided?

Parties to the Case

9. Have all Parties been joined?
10. If not, under what authority does any Party seek to join another Party?
11. Are all Parties signatories to the agreement to arbitrate? Is there any dispute over the commitment to arbitrate this matter?

Options to reduce client cost and time in arbitration

Note to Parties: it is commonly reported that arbitration is becoming increasingly expensive and time consuming – negating its theoretical advantages. In this section, you are asked about ways to save time and cost to clients. For example, would some issues be best severed from the case in chief for a Phase 1 of the hearing and a determination by the Panel in an Interim Award? Should this matter proceed to hearing through the customary case in chief followed by respondent case in chief? Or does another sequence of hearing make more sense (such as a two or three phase hearing)?

12. Do bifurcated or multiple hearings make sense in this Case? For example, if the Panel found it suitable, would an Interim Award on some issues help the Parties simplify the matter or consider other options for final resolution?
13. Do you propose any options to limit/reduce hearing time (such as submittal of written testimony, time limits on each party)?
14. What actions do you propose that the Panel use to move the case more efficiently or reduce costs?

Procedural issues

15. For purposed of conflict assessment, have you identified all related parties/witnesses?
16. What is the applicable arbitration rules and law?
17. What is the governing state law applicable to this case to guide the Panel?
18. How shall we handle communications with Panel?
19. Are there any related arbitrations or court proceedings that may affect the ability of this case to proceed through hearing?

Discovery – scope

Note to counsel: Discovery in arbitration is typically limited to reduce cost and increase speed. Discovery should be limited to that necessary to and directly related to the claims and counterclaims in this case.

20. For each claim identified above, what is the discovery necessary to prove or seek to disprove the claim?

21. From whom is discovery expected? Parties or non-parties also. If from non-parties, have you considered whether it can be voluntary or do you expect to need subpoenas?

Discovery - methods

Note to counsel: Options include following the Rule 26(a)(1) initial disclosure approach or a more traditional arbitration request for documents. Expert discovery is addressed in a separate section below.

22. Do you wish to initiate discovery by making Rule 26(a)(1) type initial disclosures? When? What form of supplementation if any is needed?

23. How quickly and in what methods do you proposed for document exchange?

24. What are our agreements, if any, on inadvertent production of privileged or confidential data?

25. On what early date can you identify the likely witnesses whom you may call in this case?

26. Do you seek depositions? For what purpose? How many? Of whom?

Note to counsel regarding depositions: If depositions are authorized, it is customary to permit 3-4 per party with leave to later seek more deposition if it is demonstrated that 3-4 is insufficient. In arbitration, rather than depositions, joint witness interviews (face to face or phone) are often sufficient.

27. Do you seek other forms of discovery? Please explain.

28. How far ahead of the hearing should discovery be completed?

29. Do you seek third party discovery? How do you view the legal limitations on third party discovery?

Experts

30. Do you intend to present expert testimony? On what subjects?

31. Will such be rebutted by expert testimony?

32. What discovery is appropriate concerning experts?

Note to counsel: As a goal in arbitration is cost control, you should consider whether using expert reports and underlying data/files is preferable to using both reports and depositions as expert depositions necessarily increase the cost to clients. Expert depositions are a substantial cost in litigation.

33. What dates do you propose for identifying experts/rebuttal experts, and submitting expert bios and expected subjects of expert testimony?

    33.1. Simultaneous or sequentially?

33.2. Do counsel agree to produce all expert files relating to the expected testimony on this case at the time of identification of the expert or other agreed upon time?

34. What dates do you propose for exchange of expert reports?

35. Do you seek depositions of experts in addition to reports?

36. Will any lay witnesses be giving opinion testimony?

Actions prior to hearing

37. Do you now intend to file motions prior to hearing? What are the intended subjects?

38. How far in advance of the hearing (such as 45 days)?

39. How are these addressed (briefing and argument)?

Note to Parties concerning the limited circumstances for granting dispositive motions*: The guiding legal authorities suggest that, under proper circumstances, an arbitrator/Panel may dismiss claims prior to an evidentiary hearing provided the party opposing the motion has an opportunity to present its position and supporting argument. Yet the circumstances are rather limited. Part 10 of Commercial Arbitration by Thomas H. Oehmke notes that "the use of such summary proceedings [granting of such motions] in arbitration is rare, though permissible." Some authorities believe the circumstances are those where claims are frivolous, legally precluded or facially deficient. The issue of "facially deficient" was interpreted in Sheldon v. Vermonty, 269 F.3d 1202 (10th Cir. 2001) to mean that "the party therefore has no relevant evidence to present at an evidentiary hearing."*

Note to Parties concerning motions filed immediately before the hearing: Parties should anticipate that any motions filed close to the date of the hearing or after deadlines specified in the Scheduling Order will be denied, ruled upon as an evidentiary matter during the hearing or consolidated into the resolution of the case in the award.

Protection of data

40. Privilege issues: Does any party intend to call an attorney as a witness or otherwise seek testimony of legal counsel? How do the Parties intend to handle issues of privilege?

41. Confidentiality: What proposals, if any, do you make regarding the confidentiality of documents or the proceeding?

Actions immediately preceding the hearing

42. How far in advance of hearing, do you believe the following should be submitted:

42.1. Exhibits?

42.2. Trial brief? Page limits?

Prehearing focus

43. How to avoid multiple witness testimony on the same fact from the same party?

44. How can we avoid common problems on volume of documents in hearing exhibit notebooks:
    44.1. Multiple copies of the same exhibit.
    44.2. Every email or document regarding the dispute is included in hearing notebooks although only a small number are actually referred to in the hearing.
    44.3. Construction cases: Every daily report is submitted though most are not used.
45. A prehearing call to focus issues can be helpful. Will that help in this Case? *Note: Often needs to be set one or two months or more before hearing if efforts to focus provide any benefit.*

Hearing exhibits

46. Exhibits for the hearing: Is it feasible that the Parties can collaborate and produce a single comprehensive set of exhibits (inclusion not being an admission of admissibility)? How far in advance of the hearing?
47. What dates do you suggest for the exchange of demonstrative exhibits?
48. Core exhibits: Are there core exhibits (perhaps 5-10 in number) the Parties could assemble and send to the Panel with which the Panel should be familiar prior to the start of the hearing?
49. Do you anticipate there will be any issues regarding exhibit authenticity or admissibility? If so, how far in advance of hearing should any challenges to authenticity and admissibility be made? *Note: the Panel will not be applying civil rules of evidence.*
50. What steps will the Parties/counsel agree to take to reduce the total volume/number of exhibits used in the hearing?
51. Are there any evidentiary issues relating to contract interpretation that require special attention prior to the hearing?

Special issues: contract interpretation cases

52. Are there extrinsic evidence or parole issues present?
    52.1. Hearsay
    52.2. Prior drafts, evidentiary weight.
    52.3. Testimony on negotiation?
53. Are there contract integration disputes?
54. Where contract has multiple amendments, will it be helpful to create a fully restated agreement, if one does not exist, to assist us in the evidentiary phases of this Case?
55. Any testimony from attorney(ies) who negotiated the contract? Drafted? If so, what is the scope of that testimony? What are the privilege boundaries?

56. Is the use of prior drafts an issue of dispute?

Hearing issues

57. Will subpoenas be needed? How do you propose subpoenas be issued?
58. Do you have a position about whether, and the extent to which, any sworn statements and/or depositions may be introduced at the hearing?
59. What is the Parties' agreement about witness sequestration? In what ways does it apply to any depositions?
60. Where do you want the hearing held?
61. What form of record of hearing do you seek? (Stenographic, audio record, none).
62. What should be done regarding sequencing of witnesses to make the best use of our time in hearing? E.g., Having experts testify in immediate sequence to highlight differences.
63. Will computer projection of evidence be used? Costs shared?

Post hearing actions

64. Do you propose the submittal of written summations after the hearing? If so, how long between the end of the hearing and submission of the summations?

Note to counsel: post hearing summaries or memoranda obviously increase client costs, and should not be automatically proposed.

65. If claimed, how do you propose to handle any briefing and evidence on any attorneys' fees claims?
66. What form of award (standard, reasoned, standard with limited reasoning) do you seek from the Arbitrator?

Note to counsel: reasoned awards or awards with findings and conclusions obviously increase client costs above the cost associated with standard awards with limited or very limited reasoning.

Other matters likely dealt with in the Scheduling Order in this case

In addition to the above, you may expect that the scheduling order in this Case will include provisions that address the following. If you have a viewpoint on any of these, you may raise it in the preliminary hearing.

A. Clarification, or dates for clarification, of claims and affirmative defenses
B. Confirmation of jurisdiction, venue, applicability of [Name] rules and governing law
C. Procedures to limit the cost and time of preparing for and hearing this Case
D. Date for payment of panel compensation

E. Procedures for, and limitations on, the filing of motions, and the severe limits on dispositive motions

F. Dates for all discovery events

G. Confidentiality of data

H. Resolution of procedural issues by the Panel chair

I. Discovery including procedures regarding the adequacy of expert disclosures

J. Organization by the parties of a single comprehensive set of exhibits

K. Procedures for filing/presenting exhibits and briefs to the panel

L. Procedures the panel will apply during the hearing

M. Transcripts/recording of hearing if any including use of alternate methods

N. Panel disposal of exhibits 90 days after entry of the final award