

WHAT'S IN YOUR SCHEDULING ORDER?¹

by

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This paper is only an overview of the issues presented. Because of its generality and because the law is evolving the material may not apply to a specific situation and may not reflect the most current authority after this presentation.

The contents of a Scheduling and Procedure Order will vary depending upon the arbitration and the arbitrator's preferences. The Scheduling and Procedure Order for an asbestos case with two parties that uses "baseball" arbitration will look very different from a multi-party, large, complex arbitration.

General goals² of a Scheduling and Procedure Order include:

- Adjusting to electronic transmissions
- Anticipating potential problems
- Avoiding delays
- Avoiding surprises
- Changing expectations
- Changing perspectives
- Clarifying understanding
- Creating a "clean" record
- Creating a record easy to use
- Expediting award writing
- Expediting the hearing
- Gaining agreement to procedures
- Increasing efficiency
- Limiting discovery disputes
- Limiting motion practice
- Professional liability insurance
- Protecting the arbitrator
- Protecting the attorneys
- Protecting the parties
- Protecting the process
- Reducing costs

For example, to adjust to sending the Scheduling and Procedure Order as an email attachment, it may need to be formatted for reading on a computer screen, an iPad or an iPhone. Dubose, Robert, *Legal Writing for the Re-Wired Brain*, (last visited Feb. 2, 2016) (https://www.texasbar.com/flashdrive/materials/managing_your_law_practice/Special_ManagingYourLawPracticeCLE_LegalWritingRewiredBrain_Dubose_FinalArticle.pdf); Cruz, Michael A., Deputy Clerk, Tex. Sup. Ct., *Formatting for an iPad (or Any Other Medium)* (<http://www.search.txcourts.gov/files/formattingforipad.pdf>) (last visited Feb. 2, 2016).

¹ I wish to acknowledge the following arbitrators from whom I have borrowed provisions for inclusion in this paper: John Allen Chalk, Bill Lemons, Cecilia Morgan, Robert Prather, Mark Shank, D.C. Toedt III, and Maretta Comfort Toedt as well as those I have borrowed from over the years and have now forgotten the origin of the provision.

² See Toedt III, D.C. and Toedt, Maretta Comfort, *An Arbitration Scheduling Order to Get to a Hearing in 12 Weeks, Adapted from the Manual for Complex Litigation, [Draft]* (last visited Feb. 2, 2016), (<http://www.oncontracts.com/docs/Arbitration-Scheduling-Order-2015-01-05.pdf>) and Lemons, William, *I Am Your Arbitrator. Here Is What to Expect from Me . . . and What I Expect from You*, (last visited Feb. 2, 2016) (<http://www.whlemonsadr.com/pdf/i-am-your-arbitrator-new.pdf>).

For example:

- Enable skimming.
- Omit words.
- Do not force your readers to think.
- Make it simple.
- Use white space.
- Put the most important content in the top left of the page.
- Use larger fonts (e.g., the 5th Circuit requires 14 point font for text)
- Insert bookmarks for navigating in a pdf file.
- Use “save as” in Word to maintain bookmarks and hyperlinks in a pdf file.

Also, you may want to change the expectation that arbitration will simply be the same as a bench trial. For example, you may refer to “information exchange” instead of “discovery” and limit the information exchanged to information that will aid the fact-finder in determining the issues presented rather than using the trial court standard of material and relevant.

Professional liability insurance may require you to provide “a written statement to all parties explaining the member’s role as a neutral intermediary and stating that the member may not act as an advocate for either party.” (AAM’s professional liability insurance coverage requirement).

You may use the Scheduling and Procedure Order to explore methods to reduce disputes concerning the exchange of information, e.g., encourage conference calls instead of motions, state you will not “fix” overbroad requests or discourage such disputes by requiring lead counsel to submit a joint report.

You may allow others to experiment with such novel concepts as circulating a “Draft Award” to counsel.

Requiring briefs to be furnished as word processing files allows the arbitrator to use a service to link to cases such as Blueline³ (currently free in beta testing) (<https://blueline.blue/>) or to link cases using a paid service such as West’s Drafting Assistant or Lexis for Microsoft Office. West and Lexis software also flags overruled or questioned cases.

You may elect to keep the Scheduling Order short and issue a separate Procedure Order. You may elect to follow some listed items as a practice but not mention it to the parties. For example, you may not disclose how you handle the late exchange of information if you perceive it may encourage late exchanges.

³ Blueline generally links to its database or Google Scholar. Blueline created the links to cases in this paper. Given that it is in beta testing, note that it failed to link all the cases, including ones that can be found in Google Scholar, and some links lead to the wrong case.

Sample Scheduling and Procedure Order

IN THE ARBITRATION BETWEEN:

***, CLAIMANT**

&

***, RESPONDENT**

AMERICAN ARBITRATION ASSOCIATION

***EMPLOYMENT TRIBUNAL**

CASE NO. *

HEARING ORDER NO. 1

ARBITRATOR: *

SCHEDULING AND PROCEDURE ORDER

Pursuant to the *Arbitration Rules of the American Arbitration Association (AAA), the parties attended a preliminary hearing on * before Arbitrator *. Appearing at the conference call was * for Claimant and * for Respondent. * representing Claimant and * representing Respondent also appeared. *, Case Manager, also participated *for part of the call.

1. *Delivery to Parties of Scheduling and Procedure Order. Upon receipt, Counsel will deliver a copy of this Scheduling and Procedure Order to the party Counsel represents.

2. Schedule. The following schedule is set:

a. Hearing. The hearing is scheduled for *, 201*, beginning at *:00 a.m. (Central). The location for the hearing is *tentatively set for *the offices of the Arbitrator at *. *The location of the arbitration will be confirmed 30 days before the hearing. The hearing will take place at *. *If the parties do not agree upon a location for the arbitration at least 45 days before the hearing, the Arbitrator may designate a location in *.

***This is a firm setting, and will not be continued absent very exceptional circumstances measured by a showing of good cause.**

b. *Conference call. On * at * a.m. (Central), the Arbitrator and Lead Counsel will participate in a telephone conference call to discuss procedural and administrative arrangements for the hearing.

c. *Amended Statement of Claims. Not later than *, each party seeking affirmative relief shall file with the *AAA case manager a complete and updated statement of the specific legal claims for affirmative relief asserted by that party, a description of the general factual basis for each such claim, and a specification of the type and approximate amount of damages claimed. This statement of claims shall be seasonably supplemented, on an ongoing basis, as discovery progresses in this matter.

d. *Amended Answering Statement. Not later than *, each party who is responding to claims for affirmative relief asserted by a party-opponent shall file with the *AAA case manager a complete and updated answering statement containing that party's specific affirmative defenses or pleas in bar asserted in response to the party-opponent's Amended Statement of Claims, and containing any other defensive matters on which the party will bear the burden of persuasion. This answering statement shall be seasonably supplemented, on an ongoing basis, as discovery progresses in this matter.

e. *Claimant's Amendments. By *, Claimant will file any amendment to his claim.

*At a minimum, this must contain an outline of the claims, a description of the principal issues involved, a statement of each party's contentions and a summary of the specific relief requested (i.e., a "damage model").

f. *Respondent's Amendments. By *, Respondent will file any amendments to its answer, including any counterclaim.

*At a minimum, this must contain an outline of the claims, a description of the principal issues involved, a statement of each party's contentions and a summary of the specific relief requested (i.e., a "damage model").

g. Mediation. By *, the parties will participate in a mediation.

h. *Joinder of Additional Parties. Joinder of additional parties may be accomplished without leave of the arbitrators not later than * after which date leave shall be required upon a showing of good cause and substantial need.

i. Disclosures. The parties shall simultaneously submit to each other the disclosures described in Texas Rules of Civil Procedure Rule 194.2 by no later than *.

j. Information Exchange. By *, all information exchange will be completed.

k. Dispositive Motions. By *, any dispositive motion will be filed. A response is due 21 days later, and a reply is due 7 days following the filing of the response.

l. *Daubert Motions. By *, any motion to exclude or limit expert testimony will be filed. A response is due 7 days later, and a reply is due 7 days following the filing of the response.

m. Witness Lists. By *, each party will give to the other and to the Case Manager its witness list for the hearing.

n. Exhibit Lists. By *, each party will give to the other and to the Case Manager its exhibit list for the hearing.

o. Affidavits. Any party choosing to present testimony at the final hearing by affidavit shall provide a copy of the signed affidavit to the opposing party or parties by no later than *. Any party choosing to present a controverting affidavit at the final hearing shall provide the opposing party or parties a copy of the controverting affidavit by no later than *.

p. *Prehearing submissions. Both parties will file a prehearing statement no later than *, 201* containing:

1. List of witnesses.
2. List of exhibits.
3. Material facts at issue.
4. Issues of law.
5. Citations to statutes and relevant case law.

All submissions will be delivered via email to the Case Manager and in a word processing format.

q. Pre-Hearing Submission: Not later than *, 201*, the parties shall jointly prepare and file with the *AAA Case Manager (with a copy provided directly to the Arbitrator) a Pre-Hearing Submission, including the following:

1. A brief (one page or less) summary of each party's general position on the matters in dispute;
2. A joint statement of uncontested or stipulated facts;
3. Not later than the deadlines set forth below, a list of witnesses to be called at the hearing by each party. For each witness, a single line explanation of the witness' role in the case should be provided. For witnesses whose testimony will be presented by videotape or other electronic or remote means, identify the method by which the testimony will be presented;

4. Copies of essential cases, applicable law from jurisdictions other than *Texas, and other important legal authorities which are likely to be the central focus of a party's arguments regarding disputed issues of law, or which will likely be needed by the Arbitrator in order to properly interpret the testimony and other evidence to be presented at the hearing. Materials regarding common or well settled standards and principles need not be provided.
- r. **Agreed Deadlines.** *By * 201*, the parties will agree on deadlines. If the parties have not agreed on additional deadlines by *, the Arbitrator may set additional deadlines which the parties may alter by mutual agreement. Any other deadlines agreed to by the parties are incorporated by this reference for all purposes.
- s. **Findings and Conclusion.** *By *, the parties are to submit to the *AAA Case Manager proposed findings of fact and conclusions of law in a word processing document.
- t. **Pre-Hearing Conference:** A pre-hearing conference to address preliminary and other housekeeping issues will be scheduled at the request of either party.
- u. **Other Deadlines.** *Any other deadlines agreed to by the parties are incorporated by this reference for all purposes, such as prehearing position statements, designation of experts, and stipulations.

If any deadline falls on a weekend or holiday, the deadline will be the next business day.

Except for the hearing dates, the parties may alter this schedule by agreement.

3. **AAA Rules.** The * Arbitration Rules of the AAA in effect as of *June 1, 2009 ("Rules") will apply as supplemented by the rules agreed to by the parties. *The arbitration must be conducted in accordance with the Rules except as otherwise agreed in writing by the Claimant, the Respondent, and consented to by the Arbitrator.
4. **Neutrality of Arbitrator.** *Claimant, who is not represented by an attorney, confirmed that *he understands that the Arbitrator is a neutral decision maker and does not serve as an attorney or representative for either party. *Further, Claimant confirmed *he understands that retaining an attorney for this matter near any deadline will not be a good cause for postponing any deadlines.
5. **Neutrality of Arbitrator.** *The Arbitrator serves as a neutral intermediary and may not act as an advocate for any party. *Counsel acknowledge the Arbitrator's prior disclosures and have expressed no objection to the service of the currently assigned Arbitrator. *All Panel members have made disclosures to the *AAA Case Manager for distribution to the Parties and their respective appointments have been confirmed by the *AAA.

6. ***Neutrality of Arbitrators.** The party-appointed arbitrators shall act as neutral arbitrators but shall submit neutral billing statements and neutral requests for deposits to the party that appointed them pursuant to Rule *, AHLA Rules of Procedure for Arbitration, and Rule *, AHLA Code of Ethics for Arbitrators.
7. ***Retaining Counsel.** Claimant confirmed *he understands that retaining an attorney for this matter near any deadline will not be a good cause for postponing any deadlines.
8. ***Parties.** The Parties have stipulated that as of *, all proper parties are before the Arbitrator and are subject to the jurisdiction of the Arbitrator.
9. ***Jurisdiction.** The parties agreed all conditions of the parties' arbitration agreement have been met. *Also, the parties agreed the Arbitrator had jurisdiction and the authority to determine the issues, to issue a final and binding award and to fashion an appropriate remedy.
10. ***Burden of Proof.** The parties agreed Claimant has the burden of proof on the issues, except that Respondent has the burden of proof for its affirmative defenses.
11. ***Notice of Appearance.** If any party adds additional lawyers and/or law firms to their attorney team, that party shall file an appropriate Notice of Appearance prior to any appearance by that lawyer and or law firm in a hearing and/or deposition so the Arbitrator may make any necessary additional disclosures. The burden to raise the necessity of any additional arbitrator disclosure shall be on the parties.
12. ***Email and Overnight Delivery.** The parties will communication with each other and the *AAA Case Manager via email. They may agree upon any system for confirming receipt of such communications, such as overnight delivery. Any exhibits or documents responding to document requests sent as attachments to an email will also be sent via overnight delivery.
13. ***Email and Overnight Delivery.** The parties will communication with each other and the *AAA Case Manager via *encrypted email. Counsel may agree upon a method for encrypting emails, e.g., an Outlook plug-in, and attachments, e.g., password protected zipped files, GnuPG, etc. Production of documents is to be by email unless impracticable (e.g., because of PDF size); where practicable, service of large documents should be by electronic means (e.g., Copy, Dropbox, Google Drive, etc.) and the parties may agree to encrypt documents prior to exchanging them electronically.
14. ***Deadlines.** All times are Central Time and all deadlines are the stated date at 11 p.m. Central Time.

15. *Deadlines. As the hearing date and the resulting award date are outside the time limit of 120 days contained in the parties' arbitration agreement, the parties will submit by *, a signed modification to alter the deadline for a decision to *. If the parties do not submit a signed modification to alter the deadline, then the Arbitrator retains the authority to alter the schedule in order to comply with the 120-day deadline in the parties' arbitration agreement.

16. *Modifications to Arbitration Agreement. The parties agreed to the following modifications to their arbitration agreement. *

17. *Delegation to the Chair. For rulings by the entire Panel, the Panel authorizes the Chair to sign orders on behalf of the entire Panel. Other than a dispositive motion, all other prehearing matters, including requests for subpoenas and discovery disputes are delegated by the Panel to the Chair for resolution without the necessity of full Panel consideration. A party aggrieved by the Chair's ruling on a prehearing matter may seek reconsideration by the full Panel by appropriate pleading filed not more than three (3) business days immediately following that Party's receipt of the Chair's ruling. The Panel reserves the right to assess appropriate sanctions in the event of a discovery dispute and/or motion for reconsideration. If the Chair is unavailable, the case manager will forward the matter to the first available Panel member with the same procedure for reconsideration by the full Panel.

18. *Dispositive Motion. *The parties do not anticipate any dispositive motion. *In accordance with Rule *27, within seven days of submission of a dispositive motion, the Arbitrator will review the dispositive motion and supporting materials, and will tell the parties if the nonmoving party does not need to file a response. Dispositive motions will usually be decided solely based on the papers filed, unless the Arbitrator, after reviewing the parties' submissions, specifically schedules oral argument. *The parties' attention is invited to the following passage in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, [106 S.Ct. 2505](#), 2513 (1986): "Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial."

19. *Dispositive Motions. Any party who desires to file such a motion for summary judgment must first seek permission of the arbitrator by filing a concise request to do so stating why the moving party believes that the motion is likely to succeed and dispose of or narrow the issues in the case. Permission to file a motion for summary judgment must be requested by no later than *, 201* and the motion must be filed no later than *, 201*. A response to the motion is due *, 201*, and a reply, if permitted, is due *, 201*.

20. *Dispositive Motions. Any dispositive motions are at the discretion of the arbitrator pursuant to JAMS Rule *18. The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue either by agreement of all interested parties or at the request of one party provided the other interested Parties have reasonable notice to respond to

the request. The request and response shall not exceed one page and should not have the Motion attached.

21. *Daubert Motions. Any motions seeking to exclude or limit expert testimony will be usually be decided solely on the basis of the papers filed, unless the Arbitrator, after reviewing the parties' submissions, specifically schedules additional oral argument.

22. Motions in Limine. Motions in limine (including so-called Daubert motions) will normally be decided by determining the weight to be accorded to the objected-to evidence, as opposed to determining whether or not to categorically exclude the evidence.

23. Claim. Claimant's current claims consist of *. *No claim is being made for attorneys' fees by either party.

24. Applicable Law. The Parties agreed that * law governed the dispute and that the * governed the arbitration agreement.

25. Disclosure of Witnesses. The disclosure of witnesses shall be those reasonably expected to be called and does not include rebuttal or impeaching witnesses whose testimony could not reasonably be anticipated before the hearing. The witness list will state whether the individual will be testifying in person, via telephone, via written statements, via electronic means or some other method. Generally, the party calling a witness who is not fluent in English must provide a qualified interpreter. Before the hearing, the parties will raise through the *AAA Case Manager any dispute concerning the need for an interpreter or an interpreter's qualifications.

26. *Experts. *The parties do anticipate expert witnesses and will agree upon a schedule for designating experts and providing expert reports. *The parties do not anticipate expert witnesses. If a party proposes to use an expert witness, it will provide the name of the expert and *the expert's opinions at least *90 days before the hearing or any other date selected by the parties. The other party will have *30 days to provide the name of its responsive expert and an expert report (or any other date selected by the parties). Failure to give sufficient notice to the other party so that it may retain its own expert and an expert report may lead to the exclusion of the proposed expert's testimony.

27. *Experts. A party retaining an expert will provide all other parties with a copy of the expert's narrative statement of:

- (a) the subject matter ,
- (b) the opinions to which the expert is expected to testify, and
- (c) a summary of the grounds for each opinion.

28. Attendance of Witnesses. The parties shall schedule witnesses so that the case can proceed promptly and without any unnecessary delay. Witnesses may be called out-of-order to facilitate the hearing.

29. *Depositions. With respect to depositions, they may be used in lieu of a live witness. Rather than using deposition designations, the parties are to submit the entire deposition and highlight key portions to which they wish to direct the Arbitrator. Counsel will exchange highlighted paper depositions and page and line designations for any video deposition excerpts. For any video deposition, any transcript is to be submitted as well.

30. *Arbitrator Approval of Depositions. To control costs, depositions may be taken only with the Arbitrator's specific approval for each deposition upon reasonable notice to the other party and to the deponent.

31. *Excessive Depositions. For any depositions taken in excess of the number or amount of hours approved by the Arbitrator, the Arbitrator may decline to consider any resulting evidence. *(Commercial Rule 23(d)).

32. *Affidavits. Affidavits may be acceptable as evidence at the hearing only by agreement of the parties or by order of the Arbitrator. Affidavits may be submitted in support or opposition of disposition motions.

33. Cooperation. The parties are to cooperate in the exchange of information consistent with the goal of achieving a just, speedy and cost-effective resolution. Generally, any discovery from any litigation involving this dispute may be used in this arbitration. By agreement, the parties may alter the procedures, scope and timing of information exchange and other deadlines and may add deadlines but may not alter the hearing dates or any conference call date except with the Arbitrator's approval.

34. *Exchange of Information. *Subject to the deadlines agreed upon by the parties and pursuant to Rule *9, the parties must exchange as it becomes available:

- a. the name and, if known, the address and telephone number of each individual likely to have information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- b. a copy of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; and
- c. a computation of each category of damages claimed by the disclosing party.

35. *Exchange of Information. The parties shall promptly confer and develop a mutually agreeable (1) discovery plan, including such depositions as the parties agree are necessary,

appropriate and authorized by their arbitration agreement, and (2) Protective Order, to the extent necessary or desirable. All information exchange shall be completed by the above date. The parties are admonished that traditional litigation or court-based discovery is often not helpful or productive in arbitration. Unresolved discovery disputes shall be brought to the attention of the Case Manager as soon as practicable, but in any event sufficiently in advance of the discovery cut-off so that the dispute may be resolved and any permitted discovery completed by the cut-off. Please monitor these deadlines – a late-filed Motion to Compel or discovery dispute normally is not sufficient cause to postpone a hearing. A party's failure to diligently pursue or monitor discovery will not justify the granting of a continuance.

36. *Exchange of Information Scope. *The parties are to agree upon a scope of information exchange proportionate to the dispute*, e.g., a limit of 15 interrogatories, 25 requests for production, 25 total hours of deposition, requests for electronically-stored information limited to ten key custodians, etc. *Each party may serve a total of * requests for documents upon the other. Claimant may take the deposition of *. Respondent may take the deposition of *. *Either party may take the deposition of *any treating physicians and any experts. If both parties want to depose the same *physician or expert, then they will coordinate schedules so that the individual is deposed only once. *The information exchanged is to be limited to information that will aid the fact finder in determining the issues presented.

37. *Automatic Exclusion. As a general principle, a party who fails to make, amend or supplement a discovery response in a timely manner may not introduce in evidence the material or information which was not timely disclosed, or offered in evidence the testimony of a witness who has not timely identified, absent a showing of exceptional good cause for the party's failure to timely provide the required discovery. *Among factors considered in allowing a late-designated witness or exhibit are foreseeability and prejudice. *Often, late designations may be cured by allowing the other party reasonable time to respond with additional evidence, even after the hearing.

38. *Discovery Supplementation. Each party must seasonably supplement all discovery responses to include any updated information or documents that are responsive to the matters previously raised in discovery requests. In any event, such supplemental discovery responses and disclosures must be made by each party no less than ten days prior to the hearing.

39. *Exchange of Information Disputes. The parties will first confer by conference call to seek to resolve any dispute about the exchange of information. **For any unresolved dispute, lead counsel are to file a joint report identifying the dispute, describing their efforts to resolve it, stating each side's proposal for resolving the dispute and stating why the information sought will or will not aid the Arbitrator in making a decision on the claims or defenses presented.** Generally, exchange of information disputes are decided based on the papers filed, unless the Arbitrator specifically schedules oral argument. Further, **overly broad requests or overly narrow**

restrictions on responses will normally not be revised by the Arbitrator to make them reasonable but instead will be over ruled.

40. *Discovery or Other Pre-hearing Disputes. Such disputes should be brought to the attention of the Case Manager, who will promptly schedule a telephone conference. No papers should be submitted regarding any such dispute unless requested by the Arbitrator. An additional management conference call with the Arbitrator is available upon request of the parties. If an additional conference is desired, they should ask the Case Manager to schedule one.

41. Counsel Conference Required Prior to Rulings. Before seeking a ruling from the Arbitrator on a prehearing matter, lead counsel are to first attempt to resolve the matter by a conference call.

42. *Certificate of Conference. Prior to requesting a hearing on any matter, the parties through lead counsel shall confer. If the matter is not resolved, any motion shall include

- (i) a certificate of conference indicating the date of the conference, the identities of the attorneys conferring and why agreement could not be reached, and
- (ii) a proposed order.

43. Creative Solutions. The parties may agree to creative solutions to make the proceeding simpler, less expensive and faster.

44. *Admission of Exhibits. The parties will seek to stipulate as to the admissibility of exhibits. **Generally, any issue of authenticity should be raised by the parties with each other after the exchange of documents when the party realizes the issue exists and generally no later than *two weeks before the hearing.** The parties may use stipulations, affidavits or declarations to establish the authenticity of exhibits. The exchange of exhibits shall be those reasonably expected to be offered, includes written statements, affidavits or declarations, and does not include rebuttal or impeaching exhibits which could not reasonably be anticipated before the hearing.

45. *Joint Exhibits. The parties are encouraged to agree upon a common set of exhibits and to place them in chronological order. Exhibit notebooks must contain an exhibit list.

***NOTE:** It is the parties' responsibility not only to produce the required evidence, but also to specifically point it out for the Arbitrator; this Arbitrator will not pick through hundreds of pages of exhibits searching for evidence to help one of the parties. See *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1296 n.16 (5th Cir. 1994) ("Judges are not like pigs, hunting for truffles buried in briefs."); *Georgen-Saad v. Texas Mut. Ins. Co.*, 195 F.Supp.2d 853, 859 n. 5 (W.D. Tex. 2002).

46. *Admission of Exhibits. The admission of exhibits will generally be the first order of business at the hearing. If a party challenges the authenticity of any exhibit, such challenge must be filed three days before the hearing. Other objections asserted regarding exhibits will be considered and evaluated by the Arbitrator, but such objections will typically go the weight, rather than admissibility, of the exhibit. Counsel are expected to confer with one-another prior to the final hearing in a good-faith effort to resolve any evidentiary disputes.

47. *Admission of Exhibits. All exhibits will be admitted into evidence if not objected to at or before the final scheduled case-management conference call.

48. Demonstrative Exhibits. Demonstrative exhibits, from any source, are encouraged if it appears they might help the arbitrator understand the evidence, for example timelines and lists of individuals' names with their job position. Demonstrative exhibits are to be given their own exhibit numbers and referenced in the relevant statement of facts and evidence.

49. Highlighting. Any party may mark, with colored tape flags and/or with colored highlighters, particular pages of a document being offered into evidence. Each party is to consistently use its own color of tape flag and the same color of highlighter; counsel should agree in advance on color schemes. Electronic PDF copies may be likewise marked.

50. *Exhibit Binders. Exhibits should be prepared jointly, in binders, with a table of contents, pre-marked with exhibit labels and numbered binder tabs. Three duplicate sets of exhibit binders must be provided for use by opposing counsel, the witness stand and the Arbitrator. Exhibits that are converted to electronic storage media should also be furnished to the Arbitrator in a searchable pdf format, on a thumb drive, at the hearing. *Parties may highlight key provisions in exhibits in the Arbitrator's copy.

51. *Unitary Exhibit Numbering. The Arbitrator strongly encourages the parties to confer and provide a single set of joint exhibit binders with a unitary numbering system at the hearing, which will avoid duplication of exhibits, and will minimize confusion and disruption during the proceedings.

52. *Unitary Document Numbering. To reduce the risk of confusion, each document is to be assigned a single identifying designation for use by all parties for all purposes throughout the case, including depositions (if any) and the hearing. Counsel are to agree on a uniform, document-based, production-numbering scheme for documents exchanged or produced, in which each document receives a single production number as though the document were an exhibit.

53. Duplicate Exhibits. In the interest of reducing potential confusion, counsel are not to offer duplicate exhibits having different exhibit numbers.

54. *Convenience Exhibit Files. Counsel are encourage to provide the Arbitrator with a file of anticipated exhibits to be used in the *direct and *cross examination of a witness.

55. *Exhibit Numbers. If you cannot agree on joint exhibits, use letter or party designations (e.g., CX33 (or Claimant 33), RX1 (or Respondent 1)).

56. *Hearing Room. Please notify the Case Manager prior to the hearing to arrange for any special equipment which may be needed in the hearing room to facilitate the presentation of evidence (e.g. speaker-phone, VCR, TV, projectors, etc.), or alternatively, the parties should make necessary arrangements for such equipment.

57. Forms of Evidence. Written sworn statements as well as deposition, telephone, and video telephone testimony will be accepted. *The parties may present direct testimony by a written statement and then cross-examine and redirect the witness in person, via telephone or other method permitted by the Rules. *Written statements will be treated as statements given under oath. *Even in the absence of objections, the use of leading questions to elicit substantive evidence is considered in making credibility determinations.

58. *Electronic Briefs Required. All submissions (i.e., motions) are to include an electronic copy in either Word or WordPerfect. Supporting documents, such as exhibits, may be provided in a hard copy or electronically.

59. Matters without Deadlines. Submissions (e.g., motions for which a deadline does not exist) requiring a ruling before the hearing shall be filed and served far enough before the hearing to permit a reasonable time for response, hearing of the motion, and ruling by the Arbitrator under the circumstances.

60. *Communications through *AAA. This case will be administered by exchanging documents through the *AAA. Please send all materials and correspondence to the Case Manager via **email** for transmittal to the Arbitrator with a copy to the other party. For lengthy documents, a hard copy may be requested.

61. *Document Naming. Please use the following method for naming electronically filed documents: 2016-01-20 [Claimant or Respondent] [Name of Document] [Name of Matter].

62. *Service of Documents. Documents may be served upon a party via email or any other method agreed upon by the parties.

63. *Direct Exchange. The parties have agreed to directly exchange and submit to the Arbitrator any usual or expected correspondence, including such filings as motions, briefs, scheduling and postponement requests, and exhibit and witness lists. Such correspondence

should be sent via **email**, and the opposing party and the *AAA should be copied. Please submit all correspondence intended for the Arbitrator to: *.

***Certain submissions are not covered by this arrangement.** These include any challenges to the arbitrators' service and communiqués containing settlement offers or discussions. Should the parties have any questions over whether it is proper to send a particular document to the Panel, please consult with the *AAA prior to submitting it. These communications will be monitored, allowing the *AAA to handle any administrative issues that may arise. The Case Manager is also available to convene conference calls, and will be working with the Arbitrator to assure that these exchanges are both efficient and appropriate.

64. Service of Subpoenas. Parties are responsible for service of any subpoenas. The requesting party must send a copy to the opposing party at the same time and by the same method as the request for a subpoena is sent to the Case Manager.

65. Conduct of Evidentiary Hearing.

*Per *Employment Arbitration Rules.* The hearing procedures also include:

- a) **Cross Designation of Deposition Excerpts** – To the extent that any party has designated (contemporaneous with the exchange of exhibits) excerpts of any deposition to be used at trial, at least two days before the hearing commences, the other party(ies) shall serve the designating party those portions of a deposition they desire to cross-designate.
- b) **First Day's Witnesses** – At least two days before the hearing commences, Claimant shall serve Respondent and fax to the Case Manager a list of witnesses expected to testify at the first day of hearing in the order in which each is expected to testify. If Claimant reasonably believes that his or her case-in-chief will be completed by 3:30 p.m. on the first day of hearing, Claimant shall so advise Respondent, who shall then serve Claimant and fax to the Case Manager a list of witnesses Respondent expects to testify at the first day of hearing and the order that each is expected to testify.
- c) **Beginning of Hearing** – On the first day of hearing, each party shall submit to the Arbitrator a claim-by-claim statement of the relief such party requests that the Arbitrator award.
- d) **Opening Statements** – Opening statements are limited to * minutes, unless the parties otherwise agree. Opening statements are expected to be non-argumentative and to focus on (a) the issues, (b) the proof to be presented, and (3) the specific relief sought.

- e) **End of Day** – At the close of each day of hearing, the parties will advise each other and the Arbitrator of the number and order of witnesses expected to testify on the following day.
- f) **Closing** - At closing, the parties may serve and file an amended statement of relief requested if reasonably necessary.
- g) **Rules of Evidence** – Conformity to rules of evidence is not required (*see Rule *R-34, AAA Commercial Rules). Rules of evidence may be used as a guide in determining admissibility of exhibits and the appropriateness of questions and testimony.
- h) **Depositions and Videos** - Normally, hearing time is not used to read from depositions or play video depositions. Please provide a transcript and a video for viewing by the Arbitrator outside of the hearing day.
- i) **Videoconferencing** – To reduce costs, parties should agree to use videoconferences for witnesses who will testify concerning non-critical matters.
- j) **Expert testimony** - Expert witnesses are to testify in a group-discussion format to the greatest extent practicable.
- k) **Questioning** The arbitrator will not instruct a witness to answer “yes or no” to questions that (1) are compound; (2) require the witness to make or accept a characterization rather than testify to a fact; or (3) are argumentative.
- l) **Confidentiality** - The hearing is not open to the public unless required by applicable law, except (a) on stipulation of all parties and (b) with the Arbitrator’s approval. *(See Rule *R-25, AAA Commercial Rules).
- m) **Full and Complete Hearing** – Under the Rules and pursuant to the Arbitrator’s inherent authority to provide the parties an opportunity for a full and complete hearing, the Arbitrator has the authority to require the attendance of any witness or other person necessary to a full and complete hearing if that witness or person is employed by or under the control of a party. Further, the rules of advocacy may be modified to allow the expeditious introduction of evidence and testimony, such as by proffer, with approval of the Arbitrator and so long as a full and complete record is developed.

66. *Postponement. The hearing date may be postponed only upon a showing of good cause. For example, retaining new counsel or substituting counsel is generally not good cause for a postponement. Parties may be asked to confirm consent to any mutually agreed postponement.

67. *Postponement. Upon notice and approval by the arbitrator, the parties may agree to a postponement. In the event of a contested postponement, the lead counsel and their client will participate in any contested hearing, either in person or by phone. Cancellation fees may apply to any postponement.

68. *Cancellation Policy. The parties will be requested to deposit fees sufficient to compensate the arbitrator for the scheduled hearing * days in advance of the commencement of the hearing. If the hearing is cancelled or continued for any reason within * days of the commencement of the hearing, the deposit for the cancelled day shall be deemed a cancellation fee and shall be immediately payable to the arbitrator. The arbitrator shall refund fees for any hearing day which is rebooked to the extent of fees earned on that day.

69. Form of Award. *The form of the award will be a reasoned award. *With respect to any dispositive motion, any ruling in favor of such a motion will be a reasoned ruling, and any denial will be a standard ruling.

70. *Form of Award. *The form of the award will be findings of fact and conclusions of law. *With respect to any dispositive motion, any ruling in favor of such a motion will be in the form of findings of fact and conclusions of law, and any denial will be a standard ruling. *By *, the parties are to submit to the *AAA Case Manager proposed findings of fact and conclusions of law in a word processing document.

71. *Form of Award. *As required by the parties' arbitration agreement, the form of the award will be findings of fact and conclusions of law. The Award will comply with the appropriate level of detail. *Transfirst Holdings, Incorporated v. Magliarditi*, [574 Fed. Appx. 345](#), 345-46 (5th Cir. June 24, 2014); *Century Marine Inc. v. United States*, [153 F.3d 225](#), 231 (5th Cir. 1998) ("[i]f a trial judge fails to make a specific finding on a particular fact, the reviewing court may assume that the court impliedly made a finding consistent with its general holding so long as the implied finding is supported by the evidence."). The Award will not contain findings and conclusions in punctilious detail, slavishly trace the claims issue by issue and witness by witness, or indulge in exegetics, parsing or declaiming every fact and each nuance and hypothesis. *Id.* Instead, the Award will contain findings and conclusions that provide a clear understanding of the basis for the decision, *Id.* The Award will be in a form similar to that found in *Sun River Energy, Inc. v. McMillan*, No. 3:13-CV-2456-D, [2015 WL 158837](#) (N.D. Tex. Jan. 13, 2015) and *Ford v. Potter*, No. 3:07-CV-1039-D, [2008 WL 5272782](#) (N.D. Tex. Dec. 18, 2008).

72. Draft Award. The arbitrator may circulate a draft award to counsel for suggestions to correct any perceived misunderstandings, misstatements, or omissions. Alternatively, the Award itself may state that it will become final at a stated time unless it is withdrawn or modified. In either case, a party may suggest corrections in writing; upon written request by a party, the arbitrator will convene a conference call at which counsel can address specific issues stated in the draft- or not-yet-final award.

73. Award and Confidentiality. In addition to the rights provided to the parties by *Rule *, the parties shall have the right to request the Panel to reconsider the award, within the time limits specified in Rule * for the additional limited purpose of considering a party's request that the award be redrafted so as to not disclose confidential or other protected information that may have been included in the award.

74. Certified Shorthand Reporter. The parties have *not indicated whether a certified shorthand reporter will be present at the hearing. *When the parties require the Award to contain findings of fact and conclusions of law, the parties must arrange for a reporter with the costs borne by *.

75. *Transcript. * has requested a certified shorthand reporter, and is responsible for arrangements for the reporter to appear. Those arrangements must include furnishing a copy of the reporter's transcript, if any, to the Arbitrator at no additional cost to the Arbitrator or the *AAA. Any fees or expenses of the reporter are the sole responsibility of the party who secures the reporter's services, and such expenses will not normally be "taxed as costs" or otherwise addressed in the Award, unless the parties expressly agree in writing to the contrary. Any such transcript will not be an official record of the proceedings.

76. *Recordings. No other means of recording are permitted as a substitute for a certified shorthand reporter.

77. Attorneys' Fees. *Any claim for attorneys' fees, costs or expenses is generally to be submitted via a written statement (or any other form as mutually agreed to by counsel, e.g., testimony) after the conclusion of live testimony and before the issuance of any award. Generally, contemporaneous billing records are sufficient. Supporting affidavits from attorneys with other firms are not required. The parties may stipulate as to these amounts. Counsel appearing in this matter need not be listed as an expert on attorneys' fees.

78. *Arbitrator accepted. The Arbitrator was accepted. If the parties or their Counsel know or learn in the future of any matter concerning the neutrality of the Arbitrator which has not been previously disclosed, they must communicate it to the *AAA Case Manager as soon as they learn of it.

79. *Return of Materials. The Arbitrator retains material submitted by the parties only as long as the Arbitrator retains jurisdiction over this matter. Thereafter, such material is disposed of in accordance with the Arbitrator's document destruction policy. If any party desires the return of any material submitted, then the party is to designate that material on its face as one to be returned and identify to whom the material is to be returned along with an address. The same information is to be provided on the exhibit list denoting the material to be returned.

80. *Corrections or Objections to Order. If either party believes any item in this Order does not accurately reflect the parties' agreements or objects to any item in this Order, the party shall notify the *AAA Case Manager by*.

81. Modifications. The Arbitrator may decline to give effect to a proposed modification or waiver of this Order, even if the modification or waiver was agreed to by the parties' counsel, unless the modification or waiver was approved, either in writing or orally at a case-management conference call, by (1) each party that is a natural person, and (2) an authorized in-house representative of each party that is an entity.

82. Effective Date. This Order shall continue in effect unless and until amended by a later order of the Arbitrator.

Date

*, Arbitrator

*Agreed to:

* _____
*

State Bar Card No. *

*P.C.

* Ste *

Dallas, Texas *

Attorneys for Claimant *

* _____
*

State Bar Card No. *

*P.C.

* Ste *

Dallas, Texas *

Attorneys for Respondent *

* _____
*, Claimant

* _____
*, Vice President, on behalf of
*Respondent

***UNREPRESENTED PARTY ADDENDUM TO HEARING PROCEDURES**

I, the undersigned Party, _____, individually and in all his /her capacities, am not represented by a lawyer in this matter and do not plan to be represented by a lawyer at the hearing to be conducted by the Arbitrator *, on * 20* , in the arbitration * . In a conference call with the representative of the * and the Arbitrator, I have been advised by the Arbitrator of the following and understand:

1. That I may be represented by a lawyer in this proceeding;
2. That the Arbitrator is not my lawyer in any manner, and has not provided, and will not provide, to me any legal advice regarding this matter or any other matter. Anything that the Arbitrator says or does is not to be construed as providing legal services or advice to me. Furthermore, I understand that I may obtain my own lawyer to provide me with legal advice on any issue of interest to me.
3. That the Arbitrator is a neutral who does not serve as a lawyer or representative for either party.
4. That the Arbitrator presides over the hearing, listens to and receives evidence at the hearing and then makes a recommendation.

This is to certify further that I have read the American Arbitration Association Rules and Procedures; I understand those rules and procedures; and, I knowingly decline to seek the advice of or use of independent legal counsel before agreeing to those rules and procedures or signing this addendum and in participating in the arbitration.

Signed *, 20*.

_____,
Individually and in all my capacities