**Reference Tool**

After reviewing the parties’ submissions to date from the AAA WebFile, the Arbitrator(s) may use this reference tool to help identify topics that may be relevant to discuss with the parties during the Preliminary Hearing (“PH”), or to develop their PH Order. This reference tool is **not** intended for distribution to parties. Instead, it should be used as a resource for the arbitrator(s) in managing cases. The topics listed below may or may not apply in a specific case.

**How to Use this Reference Tool**

After reviewing the parties’ submissions, and using the table below, Arbitrators can check the far left box if the topic applies. For example, does the arbitration clause or the parties’ contract already establish the governing law, rules, or procedures? If yes, the Arbitrator can note that information and confirm it with the parties during the PH. If not, the Arbitrator may wish to raise this issue during the PH. See “words of caution” below for additional guidance.

The Arbitrator can skip those topics that do not apply to the case and can insert deadlines in the notes column during the PH for a particular topic where the Arbitrator and parties agree. After the PH concludes, the Arbitrator can use the notes to create the PH Order. Topics for which the Arbitrator deferred decisions can become part of the parties’ “homework” to see if agreements can be reached and later communicated back to the Arbitrator.

**Review Applicable Annexes to the Rules**

In addition to this reference tool, the Arbitrator should review the applicable Preliminary Hearing Procedures (the “P” procedures), and Procedures for Large, Complex Commercial or Construction Disputes within the AAA’s Commercial Rules and Mediation Procedures (herein “Comm. Rules”) or Construction Industry Arbitration Rules and Mediation Procedures (herein “Const. Rules”). The AAA will typically instruct the parties to review the “P” procedures prior to the PH.

**General Comments Arbitrators may find helpful for the PH:**

1. Professionalism. The Arbitrator sets the expectation for counsel to be professional and courteous throughout proceedings.
2. Dates and Deadlines. Once the Arbitrator has established any deadlines the parties may not modify those dates jointly or unilaterally; modifications require Arbitrator approval.
3. Unresolved Procedural Issues. Provided the parties adopt the direct exchange program, the parties may send communication to the Arbitrator concerning issues, but only after conferring with opposing counsel first; the Arbitrator will allow parties to respond.
4. Settlement or Mediation Discussions. The Code of Ethics precludes arbitrators from pressuring parties to settle their case. However, the Code permits arbitrators to encourage use of mediation or similar ADR tools.
5. Obligation to Update Conflicts Checklists. Parties and Arbitrators are to continue to update their conflicts and disclosures as the case progresses. Early disclosures of fact and expert witnesses assist with this goal.

**A Few Words of Caution**

Certain topics on this list may be more appropriate for a party, rather than the Arbitrator, to raise. Before the Arbitrator takes the initiative in opening discussion on a topic not first posed by a party, the Arbitrator should consider the following:

1. Whether the Arbitrator’s action could raise an issue where none otherwise exists;
2. Whether the Arbitrator would be stepping out of the neutral role and, in effect, would be engaging in advocacy for or assistance to one party;
3. Whether an inquiry by the Arbitrator may touch on privileged communication between counsel and client;
4. Whether the parties are not raising an issue because of an agreement of which the Arbitrator need not or should not be aware; and
5. Whether a party has not suggested a process or issue because the expense and time associated with it would be disproportionate to the amount in controversy. Likewise, whether the Arbitrator should not raise a topic or suggest an option that would be disproportionate to the dispute.

**Discuss *Pro Se* Parties and Other Special Circumstances with the AAA**

The Arbitrator should bear in mind that special considerations or steps may apply:

1. When one or more parties are proceeding *pro se* or are dealing with a party’s counsel withdrawing or terminating their representation; or
2. When it appears at or before the PH that one party intends not to participate in the PH and/or the evidentiary hearing.
3. Arbitrators are encourage to direct *pro se* parties to appropriate AAA resources.

**Topics Arbitrator Should Not Discuss with Parties/Counsel during PH or otherwise**:

1. Disclosures; Conflicts of Interest. Do not make oral disclosures to parties or counsel. Disclosures should be in writing to the AAA. Even if the perceived disclosure obligation occurs in the middle of a hearing, the Arbitrator should take a recess and contact the AAA with the disclosure. The AAA will then communicate the disclosure to the parties/ counsel by email for expediency to make the disclosure, by email for expediency.
2. Financial Matters. Do not discuss deposits, amounts, who is paying what; only raise these topics with the AAA.

Preliminary Hearing (PH) Date/Time: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Case #: \_\_\_\_\_\_\_\_\_\_\_\_\_

Case Name: Counsel/Representative:

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

v.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

|  |  |  |
| --- | --- | --- |
| **Check Box** | **Topic**  | **Notes** |
|  | **Case Participants, History**  |  |
|  | Identification of Parties (Their role in case?) Representatives, CounselChange of Counsel, etc. |  |
|  | Locale of Hearing |  |
|  | Arbitrability and Jurisdiction  |  |
|  | Preconditions to ArbitrationAre there preconditions that must be met? For example, mediation? Negotiation by senior executives? Or other steps or procedures? |  |
|  | Identify Pending/Prior Proceedings (Other litigation, arbitration (may apply in multi-case filings in cases with employment issues/commercial contracts), administrative proceedings or rulings? Consider obtaining copies of relevant pleadings and decisions; discern status.) |  |
|  | Non-Monetary Relief Special Requirements (Clarify if non-monetary relief such as injunction, receivership, accounting, attachment, declaratory relief, indemnification, etc. is being sought) |  |
|  | Joinder/Consolidation (Pending or anticipated requests? (Construction Only)If more than 90 days have passed since case was filed, leave of the Arbitrator will be required before any new joinder or consolidation requests may be filed.   |  |
|  | Canons IX and X Wing Arbitrator Disclosures (If there are party appointed “wing” arbitrators, they must identify as neutral or not; if non-neutral, must disclose prior communications with counsel and party and advise if there will be a cut-off date for same.)\* |  |
|  | Continuing Duty of Disclosures by Parties and Counsel(Q: Require disclosure of third-party funders for arbitration purposes?  |  |
|  | Special Contract Clause Problems (review in advance)For example, designation of inapplicable rules, institutions, or time issues(may need to discuss with the AAA) |  |
|  | Direct Exchange (with the Arbitrator)Parties may elect to directly exchange communications and information with the Arbitrator; clarify this is permitted if all parties and the arbitrator agree and that it is contingent upon serving a contemporaneous copy of such information to all parties and AAA. Arbitrator may wish to request that parties upload voluminous documents and copies of legal authority to AAA WebFile, transmit via a ShareFile/Dropbox link, or by mailing submissions on a password protected thumb drive, with links to any cases or documents referenced.(The Arbitrator may discontinue this process later if deemed appropriate. Special consideration should be given in cases with non-participating parties.) |  |
|  | MediationIs mediation a condition precedent to arbitration? Have the parties already mediated? Do the parties intend to mediate? Arbitrator may set a date by which mediation shall occur to avoid delay of the hearing.Parties may contact the AAA administrator for assistanceThe Arbitrator may inform the parties that they will not entertain a postponement of the evidentiary hearings because of a tardy effort to discuss settlement. |  |
|  | **Demand, Answer and Amendments**  |  |
|  | Detailed Statement of Affirmative Claims (status/amendment/date of response to amended demand or answer) Note: this is not required, but may be helpful.A party may increase or decrease amount of claim prior to close of hearing; claim amendments require arbitrator consent.  |  |
|  | Answer, Affirmative Defenses, Counterclaims (status/amendment/date of response to amended pleading) |  |
|  | Damages Summary/Relief Requested Parties seeking affirmative relief shall identify each element of damages sought and the approximate amount, or otherwise state the relief requested. |  |
|  | **Governing Law, Rules, Procedures, Attorneys’ Fees, Costs** |  |
|  | Governing Substantive Law (Does contract specify? Do parties agree?) (Some jurisdictions prohibit Arbitrator’s use of foreign law.) |  |
|  | Governing Arbitration Rules (Does contract specify? Do parties agree?) |  |
|  | Governing Procedural Law (State arbitration act? Federal Arbitration Act?) |  |
|  | Attorneys’ Fees and Costs (Entitlement under contract? Statute? Requested by both sides? Is Arbitrator vested with authority to designate prevailing party, if there is one? Procedure? After interim award or other interim ruling?) |  |
|  | **Exchange of Information, Witness Disclosures** |  |
|  | Arbitration Hold (?)(Arbitrator discretion to ask whether there is a duty to preserve documents or a document destruction policy (if yes, may order the document destruction policy to cease during pendency of the case); may need to identify when the dispute was reasonably anticipated) |  |
|  | Cyber security processes (Urge parties to review AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy at: [AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy](https://www.adr.org/sites/default/files/document_repository/AAA258_Best_Practices_Cybersecurity_Privacy.pdf) (suggested use AAA WebFile; utilize a drop box or other mechanism for documents, exhibits for hearings)Privacy Issues (?) |  |
|  | Confidentiality/Non-Disclosure/Protective Order (if needed, suggest parties prepare and submit for Arbitrator review/execution) |  |
|  | Electronically Stored Information - ESI Protocol (if needed, suggest parties prepare and submit for Arbitrator review/execution)(Consider whether metadata of submitted documents, if available, should be produced) |  |
|  | Initial Exchange of Documents, Requests for Documents, Responses (Consider setting specific dates; some arbitrators set a deadline for parties to confer after the PH and submit a proposed schedule for approval)Counsel shall make a good faith effort to resolve discovery disputes, if any, between themselves. Counsel may submit objections that cannot be resolved between them to the Arbitrator/Panel Chair for a ruling. Dates needed for (i) written responses/objections to document requests; (ii) commencement of rolling production of responsive documents, if appropriate; (iii) completion of document production; (iv) delivery of privilege log; and (v) for bringing unresolved issues to the Arbitrator for decision. Consider whether privileged documents can be logged by category. Resolution of Disputes: Set forth a process to resolve disputes; parties to confer before presenting to Arbitrator. Determine if Arbitrator prefers to rule on submissions or hold hearing. Address whether responses to opposing parties’ request allowed. Address motions to compel, privilege objections. Consider obtaining party agreement for allowing the chair to resolve discovery dispute without input from the wings, unless necessary.Construction: Please also refer to and review the AAA Construction Arbitration Discovery Best Practices Guide.  |  |
|  | Requests for Admissions, Interrogatories(Neither is favored in arbitration. Some Arbitrators find them useful, such as for damages identification.) |  |
|  | Site Visit  |  |
|  | Non-Party/Third-Party Document SubpoenasSome jurisdictions permit non-party document request subpoenas in arbitration, some do not; suggest Arbitrator familiarize oneself with the Federal Arbitration Act (Section 7 of the FAA, 9 U.S.C. § 7) and law on third-party document requests in the jurisdiction where the subpoena is requested. Provide process for subpoena request (i.e. deadline for objections from other parties).  |  |
|  | Preliminary Fact Witness DisclosuresParties identify fact witnesses by \_\_\_\_\_\_\_\_ (date); include witness name, firm, address, and possibly a summary of the areas for anticipated testimony. |  |
|  | Claimant’s Expert Witness Disclosures (if appropriate for case)Disclosure shall include expert’s name by \_\_\_\_\_\_\_ (date), firm name, address, a copy of expert’s *CV*, and identify anticipated subject matter testimony. (If experts are providing written reports, establish deadlines. Written reports shall include a detailed description of the expert’s opinions, the basis for such opinions, identification of documents relied upon in support of those opinions, copies of any drawings, documents or demonstrative exhibits prepared in support of their opinions, and disclosure of all other litigated or arbitrated cases during last four years in which she or he testified.)  |  |
|  | Respondent’s Expert Witness Disclosures (if appropriate for case)To be disclosed by \_\_\_\_\_\_\_ (date), include same detail required by Claimant’s disclosures.  |  |
|  | Rebuttal Expert Disclosures, if any (if appropriate for case)To be disclosed by \_\_\_\_\_ (date), include same detail required by Claimant’s disclosures.  |  |
|  | Supplementary Fact Witness DisclosuresIf parties anticipate calling fact witnesses not previously identified in preliminary disclosures, the parties shall make supplementary disclosures by \_\_\_\_\_\_\_(date). The disclosure shall include the same information required for preliminary fact witness disclosures.(Consider whether the parties contemplate rebuttal witnesses, and if so, procedure for identification and subject matter) |  |
|  | Fact Witness Depositions (if appropriate for case)The Arbitrator should consider whether the parties have agreed to a limited number of depositions, along with whether depositions are appropriate and proportionate for the dispute. Note: The Procedures for Large, Complex Commercial Disputes, and Large Complex Construction Disputes, provide the Arbitrator the discretion to order depositions in exceptional cases upon good cause shown. (If allowed, each party is limited to a total of \_\_\_ hours on the record for the taking of depositions, without prejudice to seeking additional time upon good cause shown, provided no single deposition shall exceed \_\_\_ hours on the record.) |  |
|  | Expert Witness Depositions (if appropriate for the case)The Arbitrator should consider whether the parties have agreed to a limited number of depositions, along with whether depositions are appropriate and proportionate for the dispute. Note: The Procedures for Large, Complex Commercial Disputes , and Large Complex Construction Disputes, provide the Arbitrator the discretion to order depositions in exceptional cases upon good cause shown.(If allowed, each party is limited to a total of \_\_\_ hours (and/or \_\_\_ days) on the record for the taking of depositions, without prejudice to seeking additional time upon good cause shown, provided no single deposition shall exceed \_\_\_ hours on the record.)(Possible submission of a schedule to the Arbitrator) |  |
|  | Discovery/Exchange of Information Cut Off Date? |  |
|  | **Dispositive and Other Motions**  |  |
|  | Dispositive Motions (Are there threshold or potential future topics that would narrow the issues/shorten the hearings?)(Inform parties that advance Arbitrator permission is required to avoid a party filing such motion on its own.)A party must obtain advance permission from the Arbitrator prior to filing a dispositive motion on topics that may dispose of all or part of a claim or narrow the issues. A party opposing the request may file a response within xx days of receipt of the movant’s written request. For time and cost efficiency, the parties may submit the request and response in the form of a letter (not to exceed xx pages in length), in lieu of a formal motion/response. If the Arbitrator permits the movant’s request to go forward, they will provide a briefing schedule and dates for oral argument, if any. |  |
|  | Other MotionsAddress procedures, whether counsel must first confer, whether advance permission from Arbitrator is required; if permission granted is there a page limit for the motion? is permission request to be a formal motion or email request? Will Arbitrator make decision on the written submissions only?  |  |
|  | **Hearing Subpoenas** Parties should check jurisdiction of seat of arbitration and applicable procedures. If Arbitrator/Panel is executing, provide time for opposing party to respond before Arbitrator executes.Consider obtaining party agreement for chair to sign alone. |  |
|  | **Submissions in Preparation for Evidentiary Hearings** |  |
|  | Exhibit Lists to be Exchanged(Note: Some arbitrators may prefer not go into this level of detail at the PH, but instead wait until a later conference closer to the evidentiary hearing dates.)Exhibits are to be shared in an electronic format unless hard copies are requested by the arbtirators.Parties are to prepare joint exhibits consisting of indexed and pre-numbered exhibits to which parties have stipulated (all referenced as Exhibit J-\_\_\_\_). Such joint exhibits shall be deemed admitted without need to lay foundation for admission. Remaining exhibits shall be identified as “C” for Claimants and “R” for Respondents. If there are multiple parties, the parties are to agree upon a uniform designation system to distinguish exhibits.Each party shall separately list, by number and description, each exhibit they may offer into evidence (except those used solely for impeachment). Except upon a showing of good cause, the Arbitrator will not admit exhibits not identified in the initial list. (Query whether to address the admission of documents not produced, though requested, and not objected to)All exhibits are to be pre-marked and exchanged between the parties at least \_\_\_\_ days before the commencement of the evidentiary hearings, and available for inspection by the opposing party upon request.\*\*\*The AAA Hearing Exhibit Space may be utilized to upload exhibits that are to be used during the Evidentiary Hearing. Please request the Arbitrator to activate this tool, if needed, at least \_\_\_ days prior to the hearing. (Consider requiring parties to prepare individual exhibit binders consisting of exhibits to which parties have been unable to stipulate and for which a foundation must be established for admission. Counsel should be prepared to address any and all objections to documents at the beginning of the hearing.) |  |
|  | Final Witness Lists Exchanged Lists shall include fact and expert witnesses each party reasonably anticipates calling (from names previously disclosed). Except upon a showing of good cause, a party may not call a witness not previously disclosed.  |  |
|  | Pre-hearing Briefs Optional; limited to \_\_\_ pages, typewritten, 12-point font; include a copy of primary legal authority relied upon. Submissions are to be in an electronic format unless the arbitrator determines that hard copies are required. |  |
|  | Stipulations, Contested Issues, and Uncontested FactsIf appropriate, the parties shall present a joint list of stipulations, contested issues and uncontested facts (and agreed chronology of events?).  |  |
|  | **Evidentiary Hearings**  |  |
|  | Evidentiary Hearing Dates (Some Arbitrators address evidentiary hearing dates at the beginning of the PH rather than the end, and work back from there to establish other relevant dates)Number of Days, Hearing Dates, Locale, Times, Virtual Hearings Exact location and format to be determined.Arbitrator may conduct the hearings via a virtual hearing platform; see Comm. Rules; Const. Rules.Date for any additional Status Conferences and/or Pre-Hearing Conference to discuss outstanding issues and conduct/logistics of hearing, if necessary. |  |
|  | Closings/Closing Briefs/Draft Awards Closing arguments? Written closings (if applicable, set schedule for submissions? or defer decision to closer to the evidentiary hearings)? Page limits? Appendix?Answer/Responsive briefs? Only one simultaneous brief per party, no response briefs? Draft awards? |  |
|  | Type of Award (Does contract specify? see, applicable rules)Note: a future CMC topic could include a discussion of award bifurcation, if applicable. For example, an interim decision on the merits followed by entry of a final award with fees, costs assessed, if applicable. |  |

**Additional Procedures During Evidentiary Hearings**

Consider addressing these topics at the PH or a future PH/CMC:

* Will there be oral direct testimony or written witness statements in lieu of?
* Selection/Payment of Stenographers
* Selection/Payment of Interpreters
* Process for document translations
* Openings? Power Points?
* Require advance notice of demonstrative evidence?
* Any restriction on number of attendees at hearings?
* Sequestration?
* Individual Witnesses – agreement on what devices/persons can be in the room with them for virtual hearings
* Party representatives limited in number? May party switch its representative?
* Disclose to opposing counsel the order of witnesses for next day?
* Witness books with exhibits for each witness?
* Witness CV available to limit background testimony?
* May witness discuss testimony with counsel during the testimony? What happens during extended breaks such as overnight, weekends, weeks between hearings?
* May witness testify once, rather than called in each case-in-chief?
* Scope of Cross Examination (limited to direct?)
* Any rules regarding direct and cross-examination to avoid duplication?
* Whether “hot tubbing” of experts from each side will be conducted and whether experts should attempt to generate a list of topics on which they agree
* Should counsel be prepared to sit beyond the anticipated hearing time to complete the case? Including evening and weekend?
* If witness statements, will there be a warm-up period?