**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, this reference tool is 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.

**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 has typically instructed 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 evidentiary hearing dates are established, 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 encouraged to direct pro se parties to the 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
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:

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| **Check Box** | **Topic**  | **Notes** |
|  | **Case Participants, History**  |  |
|  | Identification of Parties (Their role in case?) Representatives, CounselChange of Counsel |  |
|  | 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? |  |
|  | Continuing Duty of Disclosures by Parties and Counsel(Q: Require disclosure of third-party funders for arbitration purposes?  |  |
|  | Direct Exchange (with the Arbitrator)Parties may elect to directly exchange communications and information with the Arbitrator; clarify this is permitted if all parties agree and that it is contingent upon serving a contemporaneous copy of such information to all counsel 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 is given to 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) |  |
|  | **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?) |  |
|  | 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** |  |
|  | 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) (suggest 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) |  |
|  | 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 chair to resolve discovery disputes without input from the wings, unless necessary. |  |
|  | 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. |  |
|  | **Submissions in Preparation for Evidentiary Hearings** |  |
|  | Exhibit Lists to be Exchanged(Note: Some arbitrators may prefer not to 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 arbitrators.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 witnesses each party reasonably anticipates calling. 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. |  |
|  | **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: Discuss outstanding issues and conduct/logistics of hearing.  |  |
|  | 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. |  |