



SAMPLE PROCEDURAL ORDER

Dates have been retained to show sequence.

Note: this procedural order is based upon expert reports being delivered after witness statements from all fact witnesses. In many cases, there is no need for expert reports to be delivered on a different schedule to expert reports. Considerable time savings can be achieved, if expert reports are delivered on the same schedule.

**IN THE MATTER OF AN ARBITRATION
Under the Arbitration Act, 1991, S.O. 1991, c. 17**

BETWEEN:

ABC

CLAIMANT

-AND-

XYZ

RESPONDENT

Procedural Order #1

Pleadings

- 1) The Pleadings shall be limited to the Notice of Arbitration and Answer to Notice of Arbitration, which have already been delivered.

Exchange of Evidence

- 2) The evidence of both sides shall be presented in the form of witness statements, which shall be in writing and sworn or affirmed by the witnesses.
- 3) A party that requires evidence from a witness from whom a witness statement cannot be obtained shall, at or before the time that a witness statement from that witness would

have been due, seek directions from the tribunal as to how and when the evidence of the witness in question shall be obtained and submitted to the tribunal.

- 4) The witness statements submitted by each party shall include all the evidence that party seeks to put forward through its witnesses.
- 5) The witness statements delivered by each party shall attach or be accompanied by all of the documents on which that party intends to rely at the hearing.
- 6) On or before May 31, 2018 the Claimant shall deliver its witness statements and documents.
- 7) On or before July 31, 2018 the Respondent shall deliver its responding witness statements and documents.
- 8) On or before August 31, 2018 the Claimant shall deliver its reply witness statements, and documents, if any. The reply witness statements and documents may include evidence in respect of any information or documents obtained pursuant to the process set out in paragraph 12 below, which the Claimant did not have an opportunity to address in its witness statements, reports and documents delivered on May 31, 2018.
- 9) Any witness statement a party needs to file in response to disclosure of documents, or information, or a witness statement from the other side that the party did not have a reasonable opportunity to address, may be filed by agreement of the parties or, failing agreement, pursuant to further direction. No further witness statements shall be delivered prior to the hearing without agreement of the parties or leave.
- 10) Any Expert's Report upon which the Claimant or Respondent wish to rely ("Initial Expert Reports") shall be delivered on or before October 15, 2018. Any Responding Expert's Report which the Claimant or Respondent wish to deliver in response to an Initial Expert Report delivered by the other sides shall be delivered on or before November 15, 2018. Responding Expert Reports shall be limited to comments regarding the Initial Expert Report filed by the other party and shall not include new opinions, analysis or conclusions. which the expert could have included in an Initial Expert Report.
- 11) On or before December 15, 2018, the experts who have delivered Initial or Responding Expert Reports shall meet, without counsel, and prepare a joint report a) identifying areas of disagreement, b) listing reasons for differences and c) quantifying differences.
- 12) All statements, reports and documents shall be delivered by sending a copy by e-mail to the other party and the arbitrator, by 5 pm Eastern Time of the day in question, with an additional hard copy being delivered to the arbitrator within 24 hours.

Discovery Requests

- 13) Either side may, at any time, request in writing information or documents from the other side relevant to the issues raised by the pleadings or the witness statements. Such requests, in addition to specifying the information sought, should be confined to information and documents not otherwise available to the party making the request. Any unreasonable delay in making a request for information may be denied, if granting the request would cause unjustified delay in the arbitration schedule.
- 14) Requests for information or documents shall be responded to promptly as they are received.
- 15) Any disputes regarding information or document requests, which counsel are unable to resolve after reasonable attempts to do so, shall be raised with the arbitrator by e-mail and dealt with on a conference call, without a formal motion unless so directed by the arbitrator.
- 16) No issue should be raised with the arbitrator before it has been discussed between counsel. All communications with the arbitrator shall be copied to the other side. However, it is not necessary to obtain prior approval of the other side for the content of any communication to the arbitrator.
- 17) Requests for further discovery may include requests to conduct examinations for discovery. However, unless consented to by the other party, requests for examinations for discovery will only be granted if it is demonstrated that there is a specific need for further information before the hearing and that the information requested can only be reasonably obtained in the manner requested.
- 18) In the absence of extraordinary circumstances, no requests for information, documents or discovery shall be made after September 15, 2018.
- 19) By no later than October 30, 2018 each party shall notify the other of the documents, information or discovery it has obtained from the other side which it intends to use or place in evidence at the hearing and the witnesses from the other side it requires to be produced at the hearing for cross examination.

Pre-Hearing Delivery of Material

- 20) On or before January 7, 2019, the parties shall provide to the arbitrator:
 - a) Copies of all witness statements exchanged between the parties;
 - b) Copies of expert reports exchanged between the parties;
 - c) A joint brief containing all documents identified by both sides pursuant to paragraph 19 hereof, in chronological order, indexed and tabbed;
 - d) Information or discovery from one side which the other side intends to refer to or rely upon at the hearing;

e) A hearing schedule setting out the proposed order of proceeding at the hearing, including the order in which the witnesses will be examined and the anticipated time required for the examination of each witness.

21) If the parties are unable to agree as to any of the above, one or both of them shall initiate a meeting or conference call with the arbitrator to resolve the issue.

22) On or before January 14, 2018 the parties shall deliver any pre-hearing memorial, factum or other written submissions that a party wishes to submit, along with copies of any key cases or other authorities with important passages highlighted and tabbed.

The Hearing

23) The hearing shall take place on weekdays from January 21 to February 1, 2019.

24) The hearing will conclude with oral submissions by both parties. Either party may also submit written closing submissions at or shortly after the hearing, at such time as can be agreed by the parties or as directed by the arbitrator.

25) The hearing may be at any location upon which the parties agree. Costs relating to the hearing facility shall be borne equally by both sides, subject to reallocation among the parties in any cost order made by the arbitrator.

26) The hearing shall be transcribed, if that is requested by any party. Costs relating to the transcripts shall be borne by the party requesting the transcription, subject to reallocation among the parties in any cost order made by the arbitrator.

27) A witness who has provided a statement or report shall be made available for cross-examination at the hearing unless the other side agrees otherwise. If a witness is unavailable for cross-examination, e.g. due to death or disability, the admission into evidence and the weight to be attached to the statement shall be in the discretion of the arbitrator.

28) At the evidentiary hearing, witnesses may be briefly examined by the party that submitted their statements or reports, only for the purpose of introducing the witness and highlighting key aspects of the witnesses' evidence, without adding any new evidence of substance. Such introductory examinations shall not take more than fifteen minutes and shall be followed by a cross-examination of the witness by the other side and re-examination, if requested.

29) By agreement of the parties or direction of the arbitrator, the cross-examination of any witness or witnesses may take place at a time and place other than the hearing referred to above. However, unless the parties agree otherwise, the arbitrator shall be present at any such cross-examination.

30) No document may be put to a witness in cross-examination unless it was produced by one or more of the parties prior to the hearing in accordance with the directions above relating to the production of documents in the arbitration.

Further Directions

31) Further directions may be sought by either party at any time as the need arises.

William G. Horton, C. Arb., FCI Arb
Arbitrator
April 26, 2018